APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1699

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Defendants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE

FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND; ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; NOKOTA CAPITAL MASTER FUND, L.P.,

Defendants.

No. 19-1700

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.;

TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Defendants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Laura Taylor Swain,* U.S. District Judge]

Before

Howard, Chief Judge,
Lynch and Lipez, Circuit Judges.

Bruce Bennett, with whom Benjamin Rosenblum, David R. Fox, Geoffrey S. Stewart, Beth Heifetz, Sparkle L. Sooknanan, Isel M. Perez, Jones Day, Alfredo

* Of the Southern District of New York, sitting by designation.

Fernández-Martínez, and Delgado & Fernández, LLC were on brief, for Andalusian Global Designated Activity Company; Glendon Opportunities Fund, LP; Mason Capital Master Fund LP; Nokota Capital Master Fund, L.P.; Oaktree Opportunities Fund IX (Parallel 2), L.P.; Oaktree Value Opportunities Fund, L.P.; Oaktree-Forrest Multi-Strategy, L.L.C. (Series B); Ocher Rose, L.L.C; and SV Credit, L.P.

Jason N. Zakia, Glenn M. Kurtz, John K. Cunningham, White & Case LLP, Alicia I. Lavergne-Ramírez, José C. Sánchez-Castro, Maraliz Vázquez-Marrero, and Sánchez Pirillo LLC on brief for Puerto Rico AAA Portfolio Target Maturity Fund, Inc.; Puerto Rico AAA Portfolio Bond Fund II, Inc.; Puerto Rico AAA Portfolio Bond Fund, Inc.; Puerto Rico Fixed Income Fund II, Inc.; Puerto Rico Fixed Income Fund III, Inc.; Puerto Rico Fixed Income Fund IV, Inc.; Puerto Rico Fixed Income Fund V, Inc.; Puerto Rico Fixed Income Fund, Inc.; Puerto Rico GNMA and U.S. Government Target Maturity Fund, Inc.; Puerto Rico Investors Bond Fund I, Inc.; Puerto Rico Investors Tax-Free Fund II, Inc.; Puerto Rico Investors Tax-Free Fund III, Inc.; Puerto Rico Investors Tax-Free Fund IV, Inc.; Puerto Rico Investors Tax-Free Fund V, Inc.; Puerto Rico Investors Tax-Free Fund VI, Inc.; Puerto Rico Investors Tax-Free Fund, Inc.; Puerto Rico Mortgage-Backed & U.S. Government Securities Fund, Inc.; Tax-Free Puerto Rico Fund II, Inc.; Tax-Free Puerto Rico Fund, Inc.; Tax-Free Puerto Rico Target Maturity Fund, Inc.; and UBS IRA Select Growth & Income Puerto Rico Fund.

Martin J. Bienenstock, with whom Timothy W. Mungovan, John E. Roberts, William D. Dalsen, Stephen L. Ratner, Mark D. Harris, Jeffrey W. Levitan, Margaret A. Dale, and Proskauer Rose LLP were on

brief, for the Financial Oversight and Management Board for Puerto Rico, as Representative for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico.

Catherine L. Steege, with whom Melissa M. Root, Ian Heath Gershengorn, Lindsay C. Harrison, Robert D. Gordon, Richard Levin, Jenner & Block LLP, A.J. Bennazar-Zequeira, Héctor M. Mayol Kauffmann, and Bennazar, García & Milián, C.S.P. were on brief, for the Official Committee of Retired Employees of the Commonwealth of Puerto Rico.

January 30, 2020

LYNCH, Circuit Judge. The appellant Bondholders own bonds issued in 2008 by the Employees Retirement System of the Government of the Commonwealth of Puerto Rico (the "System"). More than eight years after the bond issuance, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101–2241, to address Puerto Rico's financial crisis and, under PROMESA's Title III, id. §§ 2161-2177, provided many bankruptcy protections to Puerto Rico's government agencies. The Commonwealth and the System filed Title III petitions for such protections.

Pursuant to a stipulation in earlier litigation between the System and the Bondholders in 2017, the System filed two lawsuits against the Bondholders in the Title III court seeking declaratory relief on the "validity, priority, extent and enforceability" of the Bondholders' asserted security interest in the System's "postpetition assets," including "[employer] contributions [to the System] received postpetition." On summary judgment, the Title III court addressed three arguments made by the Bondholders. Fin. Oversight & Mgmt. Bd. for P.R. v. Andalusian Glob. Activity Co. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 385 F. Supp. 3d 138, 147–55 (D.P.R. 2019). First, the Bondholders claimed that their security interests fit within exceptions under § 552 of the Bankruptcy Code. Id. at 152. The Title III court rejected that claim. Second, the Bondholders argued that they are entitled to the protection of the "special revenue" provisions of PROMESA. Id.; see also 48 U.S.C. § 2161(a) (incorporating relevant parts of 11 U.S.C. §§ 902, 928). The Title III court held that the Bondholders were not so protected, as Employers' Contributions were not special revenues. Andalusian, 385 F. Supp. 3d at 154. Finally, the Bondholders argued

that the statutes should be construed in their favor on their first two arguments to avoid an impermissible taking under the Takings Clause of the Fifth Amendment. Id. at 154–55. The Title III court rejected this argument as well. Id. at 155. We affirm.

I.
Background

We describe the relevant statutes, facts, and procedural history of the appeals. For additional facts and procedural history, we refer the reader to the earlier litigation between these parties about these bonds. See Altair Glob. Opportunities Credit Fund, LLC v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 914 F.3d 694, 702–09 (1st Cir.), cert. denied, 140 S. Ct. 47 (2019).

A. PROMESA and the Bankruptcy Code

PROMESA created the Financial Oversight and Management Board for Puerto Rico (the "Board") and authorizes that Board "to restructure the debt of the Commonwealth of Puerto Rico through 'quasi-bankruptcy proceedings.'" Autonomous Municipality of Ponce (AMP) v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 939 F.3d 356, 359 (1st Cir. 2019) (quoting Assured Guaranty Corp. v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 872 F.3d 57, 59 (1st Cir. 2017)). Under 48 U.S.C. § 2161(a), which incorporates § 552 of the Bankruptcy Code into PROMESA, any property acquired postpetition by the Title III debtor is not subject to any prepetition lien, unless an exception applies.[1] 11 U.S.C. § 552(a). The

[1] We employ "lien" and "security interest" interchangeably, as the liens at issue were created by agreement. See 11 U.S.C. § 101(51) (defining "security interest" as a "lien created by an

Bondholders' claim is that their liens survive because of the exception in § 552(b)(1) for the proceeds of property subject to a prepetition lien. When the exception applies, the lien survives the filing of the Title III petition. See id. § 552(b)(1). For this exception to apply to a security interest, (1) the Title III debtor must have property before filing the Title III petition; (2) a security interest must attach to that property prepetition; (3) that property must generate some proceeds postpetition; and (4) a prepetition security agreement must grant a security interest in both the original prepetition property and proceeds arising from it postpetition. Id.

In addition, § 552(a)'s bar on liens against property received postpetition does not apply to "special revenues acquired by the [Title III] debtor after the commencement of the [Title III] case." Id. § 928(a); see also 48 U.S.C. § 2161(a) (incorporating 11 U.S.C. § 928(a) into PROMESA). These "special revenues . . . remain subject to any [prepetition] lien." 11 U.S.C. § 928(a). Only these special revenues as defined under § 902(2)(A) and § 902(2)(D) are argued by the Bondholders to apply here. Section 902(2)(A) special revenues are "receipts derived from the ownership, operation, or disposition of projects or systems of the [Title III] debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems." Id. § 902(2)(A). Section 902(2)(D) special revenues are "other revenues or receipts derived from particular functions of the [Title III] debtor, whether or not the debtor has other functions." Id. § 902(2)(D).

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agreement"); see also 48 U.S.C. § 2161(a) (incorporating 11 U.S.C. § 101(51)).

B. The Puerto Rico Enabling Act for the System and the Bond Resolution

In 1951, the Commonwealth created by statute the System as both a trust and government agency. Law No. 447 of May 15, 1951, 1951 P.R. Laws 1298 (the "Enabling Act") (codified as amended at P.R. Laws Ann. tit. 3, §§ 761–788). The System provides pensions and retirement benefits to employees and officers of the Commonwealth government, municipalities, and public corporations, as well as employees and members of the Commonwealth's Legislative Assembly. P.R. Laws Ann. tit. 3, § 764. The Enabling Act designated the System as "independent and separate" from other Commonwealth agencies and funded the System through mandatory contributions from both employers and employees, and the System's investment income. Altair, 914 F.3d at 704 (quoting P.R. Laws Ann. tit. 3, § 775). The employer contributions, in turn, were allocated to the System through annual appropriations in the Commonwealth budgets. P.R. Laws Ann. tit. 3, § 781(g) (repealed 2013).

As of 2008, the Enabling Act authorized the System to issue bonds, subject to conditions. Altair, 914 F.3d at 704 (citing P.R. Laws Ann. tit. 3, § 779(d)). Before the System's assets can be used for security as to bonds, the statute requires both the consent of two-thirds of the System's Board of Trustees and "the enactment of legislation by the Legislative Assembly." P.R. Laws Ann. tit. 3, § 779(d). On January 24, 2008, the System's Board of Trustees adopted a resolution authorizing the issuance of $2.9 billion in bonds. Altair, 914 F.3d at 704. The Enabling Act, as amended, references this bond issue, stating: "It is hereby clarified for future generations that the Retirement Sys-

tem made a bond issue amounting to three billion dollars, which bears between 6.25% to 6.35% interest[2] to bondholders, thus encumbering employer contributions of the System for up to fifty years." P.R. Laws Ann. tit. 3, § 779(d). The Bondholders own some of these bonds.

When the System issued these bonds, it granted the Bondholders security interests in "Pledged Property." That definition is very important to the resolution of the issues in this case. The 2008 Pension Bond Funding Resolution ("Bond Resolution") defines "Pledged Property" as:

> [1] All Revenues. [2] All right, title and interest of the System in and to Revenues, and all rights to receive the same. [3] The Funds, Accounts, and Subaccounts held by the Fiscal Agent . . . . [4] Any and all other rights and personal property . . . assigned by the System to the Fiscal Agent . . . . [5] Any and all cash and non-cash proceeds, products, offspring, rents and profits from any of the Pledged Property . . . .

"Revenues" is further defined to include "Employers' Contributions received by the System." The Resolution defines "Employers' Contributions" as "the contributions paid from and after the date hereof that are

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[2] This interest rate exceeded the then-market municipal borrowing rate of closer to four-and-a-half percent, and the 2008 System bonds are, under certain circumstances, tax-exempt. See Board of Governors of the Federal Reserve System, State and Local Bonds - Bond Buyer Go 20-Bond Municipal Bond Index (DISCONTINUED), Economic Research: Federal Reserve Bank of St. Louis (Oct. 7, 2016), https://fred.stlouisfed.org/series/WSLB20/ (indexing representative bonds' interest rates for bonds higher rated than those at issue here).

made by the Employers and any assets in lieu thereof or derived thereunder which are payable to the System pursuant to Sections 2-116, 3-105 and 4-113 of the [Enabling] Act."[3]

The System also executed a security agreement, in which it granted the Bondholders a security interest in the Pledged Property and "all proceeds thereof and all after-acquired property, subject to application as permitted by the Resolution."

In 2013, the Commonwealth legislature amended the Enabling Act in response to the ongoing financial crisis. 2013 P.R. Laws 3. Among other changes, the 2013 Amendment repealed P.R. Laws Ann. tit. 3, §§ 781, 786-5 (commonly referred to by their section numbers in the original Enabling Act, 2-116 and 3-105) with respect to active employees. Id. §§ 9, 12. In effect, this froze the accrual of pension benefits for active government employees. But, through a savings clause, the 2013 Amendment required that employers continue to make contributions to pay benefits accrued by active employees up to the effective date of the Act. P.R. Laws Ann tit. 3, § 761a. So, while the 2013 Amendment stopped the accumulation of new benefits, it also preserved for accrued benefits the concept of Employers' Contributions, and also how those Contributions were calculated, including the dependence of the calculation on the ongoing payrolls of each employer.

In 2017, the Commonwealth again amended the Enabling Act. See Con. H.R. Res. 188, 18th Legislative Assemb. (2017) ("Concurrent Resolution 188"); 2017 P.R. Laws 106. Until the 2017 Amendment, the

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[3] Codified at P.R. Laws Ann. tit. 3, §§ 781, 786-5, 787, respectively.

Enabling Act required that the contribution of government employers be at least 9.275% of their participating employees' compensation (with respect to accrued benefits). P.R. Laws Ann. tit. 3, § 781(d) (repealed 2013). The 2017 Amendment eliminated the employers' obligation to contribute to the System and required the Commonwealth General Fund to pay individual pensions.[4] See Concurrent Resolution 188. The Act does not authorize the System to charge any fees for managing participant investments or providing retirement services. P.R. Laws Ann. tit. 3, § 781.

The Enabling Act before 2017 specifies the consequences if employers fail to make their required Contributions to the System. The "director [or 'head'] of an agency, public corporation or municipality" who "knowingly, willfully, and without just cause fails to remit" his/her agency's Contributions to the System "shall be guilty of a felony." P.R. Laws Ann. tit. 3, § 781a(a), (f). More significant for present purposes, the Enabling Act also directs that, upon receiving a

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[4] The legal status of these payments and the validity of the 2017 Amendment are subject to other litigation. See, e.g., Altair Glob. Credit Opportunities Fund (A), LLC v. United States, 138 Fed. Cl. 742 (Fed. Cl. 2018); Complaint, Altair Glob. Credit Opportunities Fund (A), LLC v. Commonwealth of Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for P.R.), No. 17-00219-LTS (D.P.R. filed July 27, 2017), ECF No. 1. This other litigation raises the issues of whether the 2017 Amendment actually eliminated the Bondholders' liens and, if so, whether that action was constitutional. The Title III court has stayed the proceedings pending the outcome of the instant appeal. Order, Altair, No. 17-00219-LTS (D.P.R. filed Sept. 6, 2018), ECF No. 69. Although the 2017 Amendment repealed the Employers' Contributions provision of the Enabling Act, subsequent events could reinstate these provisions. In consequence, and for clarity, we refer to these provisions in the present tense with respect to the Contributions still required after the 2013 Amendment.

certificate of debt from the Administrator of the System, it is Centro de Recaudación de Ingresos Municipales ("CRIM"), Puerto Rico's municipal property tax collection agency, which is obligated to pay the delinquent Employers' Contributions of municipalities "on or before the fifteenth (15) day of each month" and it is the Commonwealth Secretary of the Treasury who is obligated to pay the delinquent Employers' Contributions of "an agency, public corporation, or any [Commonwealth-level government] entity . . . immediately." Id. § 781a(g), (h). The statute also states that delinquent Employers' Contributions (and several additional types of debt) "shall have priority over any other outstanding debt of" a municipality or a Commonwealth-level entity that fails to make its Contribution. Id. CRIM and the Secretary of the Treasury are obligated to give priority to those debts before addressing other debts of the municipality or Commonwealth entity. The Enabling Act's provisions do not accord the System any remedy or mechanism to collect delinquent Contributions. See id. § 781a.

C. Procedural History

The first time this court addressed these bonds, it held that the Bondholders had perfected a security interest in whatever property was pledged to them under the bond issuance's security agreement. Altair, 914 F.3d at 719. We then remanded to the Title III court to determine whether the Bondholders held "valid, enforceable, attached, perfected, first priority liens on and security interest in [prepetition and postpetition Employers' Contributions]" and whether the Employers' Contributions were special revenues under 11 U.S.C. § 928(a). Id. at 720.

As said, the Title III court concluded that, under 11 U.S.C. § 552(b)(1), postpetition Employers' Contributions were not proceeds of a secured, prepetition property right of the System to receive them. Andalusian, 385 F. Supp. 3d at 152. It also concluded that the Employers' Contributions were not special revenues under § 902(2)(A) or (D). Id. at 154. Finally, the court rejected the Bondholders' argument that the canon of constitutional avoidance required it to construe PROMESA's incorporation of § 552 to be prospective only. Id. at 155. In consequence, the Title III court held that, under § 552(a), postpetition Employers' Contributions were not subject to any security interest of the Bondholders, denied summary judgment to the Bondholders, and granted summary judgment to the Board. Id. These appeals followed.

II.
Standard of Review

"We review de novo the grant or denial of summary judgment, as well as pure issues of law." Rodriguez v. Am. Int'l Ins. Co. of P.R., 402 F.3d 45, 46–47 (1st Cir. 2005) (citation and emphasis omitted). We must "'view [the parties' cross motions for summary judgment] separately,' in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." OneBeacon Am. Ins. Co. v. Commercial Union Assurance Co. of Can., 684 F.3d 237, 241 (1st Cir. 2012) (quoting Estate of Hevia v. Portrio Corp., 602 F.3d 34, 40 (1st Cir. 2010)).

III.
Section 552 Prevents the Bondholders' Security Interest from Attaching to Postpetition Employers' Contributions

The Bondholders argue that § 552(a) does not bar a lien on Employers' Contributions received postpetition because those Contributions are "proceeds" within the meaning of § 552(b)(1). That is, the Bondholders argue that (1) the System's statutory authority to receive Employers' Contributions constituted a property right; (2) the Security Agreement gave the Bondholders a security interest in the System's property right to receive those Contributions; (3) the Employers' Contributions actually received postpetition are the "proceeds" of the System's prepetition property right; and (4) the Security Agreement gave the Bondholders a security interest in these "proceeds" of the System's prepetition right. They argue they have an interest in both the System's prepetition right to receive postpetition Employers' Contributions and in the employers' prepetition obligations to make postpetition contributions to the System on account of any actuarial deficit. They argue that these obligations continue postpetition and so are proceeds of the prepetition property.[5] After addressing the contract and statutory language common to these theories, we address each theory in turn.

We look at a combination of the points of the above analysis by examining the extent of the Bondholders' security interest as defined in the Bond Resolution to determine whether, as of the petition date, that interest constituted a property right to receive postpetition

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[5] At different stages of the proceedings, the Bondholders have framed the same argument in these two different ways.

Employers' Contributions. The Bondholders' security interests are restricted to those defined as Pledged Property.

"Pledged Property" is defined in the Bond Resolution to include "Revenues," and Revenues are restricted to Employers' Contributions received by the System, "rights to receive [the Revenues]," and the proceeds of any property or rights defined as Revenues.[6] The Official Statement accompanying the bonds denotes that the "[b]onds are not payable from or secured by any other assets of the System." The key to resolving the § 552 argument in this case is the limited definition of "Employers' Contributions."

We start by rejecting the Bondholders' argument, as did the Title III court, that, in the Bond Resolution's definition of Employers' Contributions, the limiting clause "which are payable to the System pursuant to Sections 2-116, 3-105 and 4-113" modifies only the antecedent phrase "any assets in lieu thereof or derived thereunder" and not the other antecedent phrase "the contributions paid from and after the date hereof that are made by the Employers." The Supreme Court has held that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." Paroline v. United States, 572 U.S. 434, 447 (2014) (quoting Porto Rico Ry., Light

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[6] Not at issue are other categories of Pledged Property than those addressed in this opinion. Pledged Property also comprises various funds, accounts, and additional rights of the System. "Revenues" is also defined to include various other payments and income received by the System (and unrelated to Employers' Contributions). No party has argued any of these additional definitions are relevant here, so we need not discuss them further.

& Power Co. v. Mor, 253 U.S. 345, 348 (1920)). That principle applies here, and the limiting clause here is applicable to both antecedent phrases. Such Employers' Contributions, and so the extent of the security interest granted by the Security Agreement, are limited to those contributions payable to the System pursuant to Sections 2-116, 3-105, and 4-113 of the Enabling Act. We turn to each of these sections.

As to pension benefits preserved under the 2013 Amendment's savings provision, see P.R. Laws Ann. tit. 3, § 761a (2013), Section 2-116(a) states that Employers' Contributions "should" cover the difference between the total cost of the System and employee contributions. Id. § 781 (repealed 2013). The Section also provides the formula for computation of each employer's monthly contribution. Id. Importantly, the Section provides that an employer is not obligated to contribute anything until the Employers' Contributions are determinable. See id. § 781(c), (d), (f). The Section also provides that future appropriations by the legislature would allocate the funds in the amount of the Employers' Contributions. Id. § 781(g).

As to benefits similarly preserved under the savings provision of the 2013 Amendment, Section 3-105 requires Employers' Contributions to be paid for salaried employees. Id. § 786-5. These are computed in the same manner as the Contributions are for other employees.

Finally, Section 4-113 states only that the intent of the Enabling Act is that contributions, annuities, benefits, reimbursements, and administration expenses be obligations of the employers. Id. § 787.

A. As of the Petition Date, the System Did Not Have a Property Right, and the Bondholders Did Not Have a Security Interest, in Any Right To Receive Postpetition Employers' Contributions

We turn to the Bondholders' argument that their security interest in prepetition "rights" to receive Employers' Contributions gave them a security interest in Contributions received postpetition. The Security Agreement covers only Contributions paid or payable to the System and rights to receive the same under the three provisions outlined above.

We conclude that the System's statutory authority to receive postpetition Employers' Contributions constituted merely an expectancy and not a property "right" as it is clear that the payment and the amounts of the Contributions depended on work occurring on and after the petition date. It is also clear and our result is reinforced by the fact that language in the Bond Resolution and the Official Statement for the bonds explicitly contemplated that the payment of future Contributions was contingent on Puerto Rico's future fiscal status and the decisions of future Puerto Rico legislatures. Because Employers' Contributions to the System based on payroll amounts for work occurring on and after the petition date could not be determined as of the petition date, the Contributions were not payable prepetition and the Bondholders did not have any security interest in such contributions. The Bondholders thus lacked any secured interest in property that could produce postpetition "proceeds" to which they could be entitled. See 11 U.S.C. § 552(b)(1); N.H. Bus. Dev. Corp. v. Cross Baking Co. (In re Cross Baking Co.), 818 F.2d 1027, 1032 n.6 (1st Cir. 1987) (stating that "[§] 552(b) 'creates an exception for proceeds generated by prepetition collateral,

and not for property acquired by the debtor or the estate postpetition or proceeds of the same.'" (quoting 4 Collier on Bankruptcy ¶ 552.02, at 552–7 (Lawrence King ed., 15th ed. 1987))). So, the Bondholders did not have a prepetition property right in any postpetition contributions that might be made. At most, the Bondholders had an expectation.[7]

Importantly, the Bond Resolution explicitly states that the legislature of the Commonwealth might reduce (or, by implication, eliminate) Employers' Contributions, and so "adversely affect[]" the Bondholders. And legislative appropriations are the method by which the Commonwealth allocates the Employers' Contributions to the System. Although required by Section 2-116(g),[8] this directive could be disregarded

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[7] Typically, local law creates and defines property interests in bankruptcy proceedings. Soto-Rios v. Banco Popular de P.R., 662 F.3d 112, 117 (1st Cir. 2011) (citing Butner v. United States, 440 U.S. 48, 54–55 (1979)). Puerto Rico law recognizes that the mere expectancy of property is not itself a property interest. See, e.g., Redondo-Borges v. HUD, 421 F.3d 1, 9 (1st Cir. 2005) (holding that, under Puerto Rico law, a government contract bidder had only a "unilateral expectation," not a vested property interest in a Puerto Rico agency's determination of the party's responsible bidder determination, even if it prevented the party from receiving future bids and payment from the government); Carrasquillo v. Aponte Roque, 682 F. Supp. 137, 141 (D.P.R. 1988) (distinguishing between "vested property interests" and "subjective expectancies" under Puerto Rico law). This treatment of expectancies as not property interests is generally accepted. See Restatement (Third) of Trusts § 41 cmt. a (Am. Law Inst. 2003) ("By all traditional and current concepts of property, expectancies are not property interests.").

[8] At least, this was true until the Contributions provisions were repealed with respect to future benefits in 2013 and fully repealed in 2017.

by a subsequent legislature (to the Bondholders' detriment). See P.R. Laws Ann. tit. 3, § 781(g) (repealed 2013); United States v. Winstar Corp., 518 U.S. 839, 873 (1996) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and one . . . legislature cannot abridge the powers of a succeeding legislature." (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810))).

Moreover, the Official Statement for the bonds explicitly contemplates that, if faced with insufficient funds to pay approved appropriations, the Commonwealth would prioritize paying public debt over funding Employers' Contributions. As the Official Statement provides, "[t]his Constitutional restriction does not apply to Employers' Contributions made by public corporations and municipalities, because the funds of public corporations and municipalities are not 'available resources' of the Commonwealth." This language in the Official Statement put the Bondholders on notice that the Employers' Contributions stem from appropriations that the Commonwealth legislature could, and likely would, reduce if it could not fully fund its planned appropriations.

The Bondholders knew that if the Commonwealth experienced additional financial problems, such problems could adversely affect the Bondholders. These known risks of alterations to the Employers' Contributions distinguish the instant case from the cases the Bondholders cite regarding liens on prepetition contracts. See, e.g., United Va. Bank v. Slab Fork Coal Co., 784 F.2d 1188, 1191 (4th Cir. 1986) (deciding whether postpetition payments under a coal contract made subject to a prepetition lien were proceeds subject to the same lien).

The Bondholders argue that Cadle Co. v. Schlichtmann, 267 F.3d 14 (1st Cir. 2001), requires that we rule in their favor. Not so. In fact, Cadle, although partially distinguishable on the facts, supports the Board. In Cadle, a law firm granted to a bank a security interest in its accounts receivable, including a $300,000 contingency fee interest in escrowed settlement funds. Id. at 16. Schlichtmann, a partner in the firm, later declared bankruptcy and the firm dissolved. Id. Schlichtmann completed the remaining work on the settlement, distributed the $300,000 among himself and his partners, and did not transfer anything to the security interest owner. Id. Although the finalization of the settlement depended on judicial approval, the security interest had attached to the escrowed funds. Id. at 19. Those funds were not "future fees", id. at 18 n.2, as "the amount of the fee . . . was established outside of Schlichtmann's bankruptcy," id. at 19, and nothing in the security agreement suggested that "the fees or the security interest were contingent on the performance of substantial further legal services," id. at 21. On these facts, the Cadle court held that the contingent fee was proceeds of a prepetition account receivable, not after-acquired property, and so the security interest survived under § 552(b)(1). Id.

The facts here differ considerably. The Bondholders claim a security interest in future, yet-to-be calculated or contributed Employers' Contributions, and not in deposited funds. Unlike the fee in Cadle, the Contributions at issue are only determinable postpetition and so are not "established outside of . . . bankruptcy." Id. at 19. Further, unlike in Cadle, the future Employers' Contributions necessarily depend on future payrolls, which depend in turn on the performance of labor by government employees. Although

the finality of the settlement was contingent on judicial and regulatory approval, the secured property in Cadle was otherwise fixed prepetition and payable at any time. The postpetition Employers' Contributions here, by contrast, are not payable until they are determined postpetition. As of the petition date, postpetition Employers' Contributions were too indeterminate for any "right" to receive postpetition Employers' Contributions to be prepetition property of which those postpetition Contributions could be proceeds.[9]

B. The Bondholders Do Not Have Liens on "Obligations" of Employers To Solve Any Deficiency in the Pension System

The Bondholders raise another theory of recovery under § 552(b): they claim to have a prepetition security interest in payments on the employers' "obligation" to pay down the actuarial deficit, that Employers' Contributions are proceeds of this actuarial deficit obligation, and so they conclude the Bondholders have a security interest in these actuarial deficit "proceeds"

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[9] Valley Bank & Trust Co. v. Spectrum Scan, LLC (In re Tracy Broadcasting), 696 F.3d 1051 (10th Cir. 2012), cited by the Bondholders, is, of course, not binding on us and further is similarly distinguishable. Tracy held that the right to the proceeds of selling a Federal Communications Commission license was prepetition property, the postpetition revenues from selling the license were proceeds of that property, and so the creditor's security interest in the sale proceeds survived the debtor's bankruptcy under § 552(b)(1). Id. at 1058–59.

In Tracy, the FCC license already existed, so the right to its sale proceeds was more analogous to uncalculated accounts receivable than the "right to receive" Employers' Contributions, which arise postpetition from employee labor and salary every month.

under § 552(b)(1).[10] This theory fails both because the plain language of the Security Agreement and Bond Resolution does not include the Bondholders' purported collateral and because the Employers' Contributions are not "proceeds" as a matter of fact or of law.

1. The Security Agreement's Language Does Not Cover the Actuarial Deficit

As said, the Bondholders only had a security interest in Contributions made under the three Puerto Rico statutory provisions discussed earlier. As to these three provisions, the Enabling Act does not create an obligation of employers to pay the actuarial deficit. In consequence, there is no security interest granted by the Security Agreement in payments on any purported employer obligation to pay down the actuarial deficit.

As the Title III court correctly recognized, even were employers required to make actuarial deficit contributions, employers could not be obligated to pay actuarial deficit contributions until such deficiencies were determinable. Section 2-116(e) provides that "the [actuarial deficit] shall constitute a deficiency in the employer contribution" and that "[t]he obligation accrued as a result of this deficiency shall constitute an actuarial deficit for the System and an obligation

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[10] Even if the Bondholders' actuarial deficit argument is meant to show that they had liens on postpetition Employers' Contributions of a determinable amount (that is, the actuarial deficit as of 2013), this argument fails for the reasons stated in Section III.A. In the interest of completeness, we address in the text the Bondholders' actuarial deficit argument as one separate from the Bondholders' primary § 552 argument, and not merely as a response to the Title III court's conclusion that the Bondholders' purported prepetition collateral was insufficiently "fixed in form or quantity."

of the employer." P.R. Laws Ann. tit. 3, § 781(e). The Bondholders did not acquire a security interest explicitly in payments toward the deficit. The statutory provisions that do give the Bondholders a security interest merely require employers to pay whatever rate the System's Administrator sets (not the entire deficit). See id. §§ 781(c), (d), 786-5.

Because this deficit is calculated after the payment of the employers' monthly contribution, as a factual matter, it cannot be a part of that contribution. See id. § 781 (c)–(e). Under Section 3-105, Employers' Contributions are based on the salary of each participant covered by the System retirement program. Id. § 786-5. And the Employers' Contributions are required "to be made concurrently with employee contributions," id. § 781(d), and these are made monthly, id. § 780. The Title III court correctly observed that, before employees actually worked, those Contributions were not, and could not be, "fixed in form or quantity." The Employers' Contributions could not form a prepetition pool of obligations in which the Bondholders have a security interest.

In addition, Section 1-110(d) of the Enabling Act provides that the System's Administrator shall annually "certify the . . . amounts which shall be contributed by [employers]" and can "require [employers] to make additional payments to eliminate [accumulated actuarial] shortages." P.R. Laws Ann. tit. 3, § 782(d). That section makes it plain that employers could not be required to make additional payments until there were certifications.[11]

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[11] We do not reach the additional argument by the System that even if the employer had a payment obligation to the System, that obligation would not constitute property of the System.

Our conclusion is buttressed by Section 4-113, which provides: "It is the intent of §§ 761 et seq. of this title [i.e., the Enabling Act] that the contributions required from the employer, as well as all annuities, benefits, reimbursements, and administration expenses, shall constitute obligations of the employer." P.R. Laws Ann. tit. 3, § 787 (2013). The provision expresses an aspiration that Employers' Contributions will cover the System's cost, but it does not create an additional obligation that alters Employers' Contributions. Nor does it create an interest in property to which the Bondholders' Security Agreement applies. Further, this provision clearly distinguishes between contributions and the other expenses of the System which constitute employers' obligations.

The Bondholders argue that the 2013 Amendment, by freezing the accrual of future benefits, fixed prepetition the total pension liability of the System. They then contend that Sections 2-116(e) and 4-113, which each state that deficiencies "shall constitute" employer obligations, accord the System an enforceable right to collect Employers' Contributions. See P.R. Laws Ann. tit. 3, §§ 781(e), 787. The Bondholders characterize the System's pension liability as a pool of benefits (fixed by the 2013 Amendment) for which all employers are jointly liable. In consequence, they argue, Employers' Contributions are merely a mechanism of standardizing this liability month-to-month. Not so. The Bondholders' view of the System contradicts the Enabling Act's plain language, and their asserted security interest exceeds the language of the Security Agreement. The 2013 Amendment does not change whether the Bondholders had a prepetition security interest in postpetition Employers' Contributions. It does not alter the extent of the Security

Agreement and, for the Contributions it did not discontinue, it did not alter their calculation or payment. The 2013 Amendment is irrelevant to the determination of whether the § 552(b)(1) exception applies.

2. The Employers' Contributions Cannot Be "Proceeds" of Any Deficit

Employers' Contributions cannot be proceeds of any secured, prepetition property for another reason. The Enabling Act does not include a provision that creates an obligation of the employers to plug a deficiency in the System, so no such obligation exists. It is impossible to have a lien on something that does not exist. See Sims v. Jamison, 67 F.2d 409, 411 (9th Cir. 1933) ("[T]here can be no lien upon something which does not exist at the time of the [bankruptcy] adjudication."). The Employers' Contributions cannot be the proceeds of some property interest on which the Bondholders do not have a lien.

C. The Amendment of Article 9 of the Puerto Rico Uniform Commercial Code Does Not Affect the Resolution of the § 552 Issue

The Bondholders argue that the expanded definition of collateral and proceeds in the amended Article 9 of Puerto Rico's Uniform Commercial Code ("UCC") renders as secured proceeds the Employers' Contributions. This lacks merit.

First, Congress codified the term "proceeds" in § 552(b)(1) well before Puerto Rico or any state revised Article 9. Compare Bankruptcy Abuse Prevention Act of 2005, 119 Stat. 23 (2005) (amending § 552 in 2005, its most recent amendment), with Law No. 21 of January 17, 2012, 2012 P.R. Laws 162 (codified at P.R. Laws Ann. tit. 19, §§ 2211-2409) (implementing the American Law Institute's revisions to the UCC on

January 13, 2013); Paul Hodnefield, Proposed 2010 Amendments to UCC Article 9: State-by-State Adoption (June 6, 2015), Westlaw Practical Law. When enacting, or last amending, § 552, Congress employed the definition of "proceeds" as it was at that time (not as it would be if there were a material alteration made in a future alteration of Article 9). See Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987) (stating that courts should look to a statutory term's definition when Congress enacted the statute). So, the revised definition in Puerto Rico law of Article 9 is irrelevant.

Second, even if the revised UCC Article 9 expanded the concept of collateral and altered Puerto Rico law distinguishing between expectancies and property (which we need not decide), the Bondholders' claims still require a collection on a receivable. Here, there were no postpetition collections on, i.e., proceeds of, any prepetition receivables, i.e., collateral, onto which the Bondholders' lien might attach. See P.R. Laws Ann. tit. 19, § 2212(a)(64). The only receivables at issue are the Employers' Contributions and, as said, such Contributions only become receivables after the employers' employees actually performed the work necessary for payroll to be calculated.[12] The Bondholders do not have the security interest they claim to have in postpetition Employers' Contributions.

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[12] This analysis does not address Employers' Contributions calculated and owed, but not paid to the System, before the filing of the Title III petition. The Board concedes that the Bondholders have a security interest in these receivables.

IV.
The Bondholders Did Not Have Special Revenue Bonds Under § 902(2)(A) or (D)

The Bondholders argue that the Employers' Contributions are special revenues within the meaning of 11 U.S.C. § 902(2)(A) and (D). Section 902(2)(A) defines as "special revenues" any "receipts derived from the ownership, operation, or disposition of . . . systems . . . primarily used or intended to be used primarily to provide transportation, utility, or other services." Id. § 902(2)(A). Section 902(2)(D) defines as "special revenues" "other revenues or receipts derived from particular functions of the debtor." Id. § 902(2)(D). This statutory analysis turns on whether the Employers' Contributions are "derived from" the ownership or operation of a system of "other services" provided the System or the "particular functions" of the System. The "particular function" of the System is limited to collecting Employers' Contributions, making investments, and paying out pension benefits.

The Title III court concluded that the Employers' Contributions were not special revenues. Applying the canon of ejusdem generis, the Title III court concluded that, in § 902(2)(A), "other services" comprised only "physical system[s] of providing services to third parties." Andalusian, 385 F. Supp. 3d at 154. The court then held that, because the System did not provide transportation, utility, or other services involving a "physical system," the Bondholders did not have special revenue bonds under § 902(2)(A). Id.

Turning to § 902(2)(D), the Title III court stated that the System served as a conduit for the deferred compensation of government employees through the Contributions, it did not charge any fees for its services, the Employers' Contributions were not derived

from a "particular function" of the System, and so Bondholders did not have special revenue bonds under § 902(2)(D). Id.

On appeal, the Bondholders argue that the System derives the Employers' Contributions from its ownership and operation of the pension system because, as defined in the Bond Resolution, the System performs its pension functions "due to its statutory right to receive Employers' Contributions." They define "derive" as "to take or receive especially from a specific source," citing Derive, Webster's Ninth Collegiate Dictionary (1986). The Bondholders also argue that, because the System receives Employers' Contributions, for that same reason it performs its "particular functions," and Employers' Contributions are "fees" for providing pension benefits, the Employers' Contributions are special revenues under § 902(2)(D).

Neither the Bankruptcy Code nor PROMESA give "derived from" a special definition. In consequence, we "construe [it] in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994) (citing Smith v. United States, 508 U.S. 223, 228 (1993)). In this context, we interpret "derived from" as requiring that Employers' Contributions originate in the System's "particular functions" or its "ownership, operation, or disposition of" a system of "other services." See Derive, Webster's Third New International Dictionary (1993) (defining "derive" as "to have or take origin: ORIGINATE: STEM, EMANATE"); Derive, Merriam-Webster Unabridged Dictionary, http://unabridged.merriam-webster.com/unabridged/derive (last visited Jan. 29, 2020) (same); Derive, Oxford English Dictionary Online, https://oed.com/view/Entry/50613 (last visited Jan. 29, 2020) (defining "derive" as "[t]o flow, spring, issue,

emanate, come, arise, [or] originate").[13] The Bondholders' argument fails to meet this test.

We need look only to the plain language of the statute to reject the Bondholders' special revenues arguments.[14] See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, th[e] first canon [of statutory construction] is also the last: 'judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))).

The System does not charge any fees, much less any in which the purported "special revenues" could originate. Employers do not, as the Bondholders assert, pay the System in exchange for it later paying pension benefits to employees. Instead, the employers (and employees) pool retirement savings in the System, a trust, for the future benefit of the employees. The Employers' Contributions originate in the work of

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[13] We use the definition of "derive" in its intransitive sense, as opposed to in its transitive sense (as the Bondholders do). See Bell Commc'ns Research, Inc. v. Fore Sys., Inc., 62 Fed. App'x 951, 959 (Fed. Cir. 2003) (interpreting similar "derived from" language as intransitive and concluding the best definition for "derive" was "to have or take origin: ORIGINATE: STEM, EMANATE").

[14] The legislative history of § 902(2)(D) also supports our conclusion. It indicates that Congress intended § 902(2)(D) to capture miscellaneous revenues accruing from government services to the public, like "regulatory fees and stamp taxes imposed for the recording of deeds," H.R. Rep. No. 100-1011, at 7 (1988), as reprinted in 1988 U.S.C.C.A.N. 4115, 4121; S. Rep. No. 100-506, at 21 (1988), or "tolls or fees relating to a particular service or benefit," S. Rep. No. 100-506, at 21.

the employees that generate the contributions[15] and the statutory obligation of employers to contribute.

Neither the System's "particular function" nor its "ownership" or "operation" of its system of providing pension services produces any revenue. Indeed, the Employers' Contributions, far from deriving from a "particular function" of the System, come from annual appropriations of the Commonwealth. P.R. Laws Ann. tit. 3, § 781(g) (repealed 2013). As the Title III court correctly concluded, the System merely "functions as a conduit for distribution of Employers' Contributions." Andalusian, 385 F. Supp. 3d at 154.

As to § 902(2)(A), the Employers' Contributions do not originate in either the System's ownership or disposition of pension assets, or its ownership or operation of the pension system as a whole. That the Puerto Rico legislature may have intended to direct the Employers' Contributions to the System because it owned or operated a system of pension services does not mean the Contributions originate in the System's ownership or operation. The Contributions originate in, and so are derived from, employee labor and statutory obligations, both of which occur and exist separately from any of the System's ownership interests or operation activities. In consequence, the Employers'

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[15] The Bondholders argue that, because most government labor does not actually generate revenue, the Employers' Contributions are not derived from the labor of the employees. But this lacks merit. The profitability of the employees is irrelevant. Under the Enabling Act, an employer must contribute to the System a percentage of the salary it pays its employee. P.R. Laws Ann. tit. 3, §§ 781(d), 786-5. This salary, in turn, originates in the employee's labor. But for the labor of the employee and this statutory obligation, the employer would not need to contribute. Accordingly, the Employers' Contributions are derived from employee labor.

Contributions are not special revenues under § 902(2)(A).[16]

Similarly, as to § 902(2)(D), that the "particular functions" of the System relate to the management, investment, and distribution of these funds does not mean the Contributions originate in these activities. We conclude that, although the Contributions may relate to and support the System's functions, they do not originate in them, analogously to our § 902(2)(A) reasoning. The Contributions originate in employee labor and the statutory obligation. Accordingly, the Employers' Contributions are not derived from any "particular function" of the System, and so are not "special revenues" under § 902(2)(D).

V.
Section 552 Applies Retroactively to the Security Agreement

We address the Bondholders' fallback argument that if our reading of § 552 led to a rejection of their arguments, then applying § 552 to them would "raise grave constitutional questions." We disagree. The Bondholders frame the issue as one of constitutional avoidance. They argue first that Congress has not explicitly commanded that PROMESA applies § 552 retroactively. The Bondholders then argue that the canon of constitutional avoidance requires us to interpret PROMESA as applying § 552 prospectively only, because, in their view, interpreting § 552 to impair retroactively the Bondholders' liens would violate the Takings Clause. See Jones v. United States, 529 U.S.

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[16] We need not decide the congressional meaning of "other services" in § 902(2)(A), as the Employers' Contributions are not derived from the System's ownership, operation, or disposition of its system of pension services.

848, 857 (2000) (discussing the role of the canon of constitutional avoidance "where a statute is susceptible of two constructions" (quoting U.S. ex rel. Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909))). The Bondholders argue that, because § 552 did not apply to liens granted by Puerto Rico and its instrumentalities at the time when the Bondholders purchased the bonds in 2008, see Franklin Cal. Tax-Free Tr. v. Puerto Rico, 805 F.3d 322, 329–31 (1st Cir. 2015), aff'd 136 S. Ct. 1938 (2016), then applying § 552 to the Security Agreement after they purchased the bonds would constitute an unconstitutional taking.

The Title III court addressed similar arguments and concluded that Congress, by its purpose in enacting PROMESA to address Puerto Rico's financial crises, clearly intended to apply § 552 retroactively. Andalusian, 385 F. Supp. 3d at 154–55. That ruling was correct.

Courts typically presume Congress intends a statute to operate only prospectively, but will give retrospective operation to a statute if such construction is "the manifest intention of the legislature." Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 844 (1990) (quoting Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)). PROMESA's plain language controls here and determines the issue. A court cannot adopt a statutory construction "plainly contrary to the intent of Congress" to avoid a constitutional question. Miller v. French, 530 U.S. 327, 341 (2000) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). The canon of constitutional avoidance can apply only when the statute is ambiguous. See id. (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)).

PROMESA's effective date states that "[s]ubchapters III and VI shall apply with respect to debts, claims, and liens (as such terms are defined in section 101 of Title 11) created before, on, or after [June 30, 2016]." 48 U.S.C. § 2101(b)(2) (emphasis added). PROMESA incorporates § 552 of the Bankruptcy Code under Subchapter III. Id. § 2161(a). PROMESA also adopts the Code's definitions of "lien" and "security interest." Id. § 2161(a), (c); see also 11 U.S.C. § 101(37) (defining "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation"); 11 U.S.C. § 101(51) (defining "security interest" as a "lien created by an agreement"). This shows that Congress plainly intended to apply § 552 to security interests and agreements created before the enactment of PROMESA.[17] See, e.g., Vartelas v. Holder, 566 U.S. 257, 267 (2012) (stating

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[17] Given the plain language of the statute, we need not address the parties' arguments regarding PROMESA's underlying policy rationale or that the Bondholders waived any argument regarding § 2101(b)(2).

The Bondholders have not raised in their initial appellate brief an argument based on their counterclaim V for declaratory judgment. We do not decide an argument not presented to us. See Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1, 3 (1st Cir. 1983). Nor is it clear that we would have jurisdiction over such a Takings Clause claim if it were made. See Horne v. Dep't of Agric., 569 U.S. 513, 527 (2013) ("A claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." (quoting E. Enters. v. Apfel, 524 U.S. 498, 520 (1998) (plurality opinion of O'Connor, J.))).

Indeed, the Bondholders brought a different action in the Court of Federal Claims under its exclusive Tucker Act jurisdiction, alleging that the 2017 Amendment effected an unconstitutional taking of their liens on Employers' Contributions. Altair, 138 Fed. Cl. at 752–54.

that a statutory provision applying "before, on, or after" the statute's enactment date required retroactive application); Goncalves v. Reno, 144 F.3d 110, 131–32 (1st Cir. 1998) (same).

PROMESA's statutory language clearly expresses an intent that § 552 apply retroactively, which distinguishes the instant case from United States v. Security Industrial Bank, 459 U.S. 70 (1982), which the Bondholders argue requires us to give only prospective effect to PROMESA's incorporation of § 552. This contention lacks merit. Security Industrial Bank held that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress." Id. at 81 (emphasis added). There, the Supreme Court concluded that 11 U.S.C. § 522(f)(2), a recently enacted provision of the Bankruptcy Reform Act of 1978, did not apply retroactively.[18] Id. at 82. Whether or not there is a property right at issue, as said, Congress provided an explicit command at 48 U.S.C. § 2101(b)(2) to apply PROMESA retroactively. Congress did not do so for the statute at issue in Security Industrial Bank. See 459 U.S. at 81.

The Bondholders rely on PROMESA's "[a]pproval of fiscal plans" provision for their interpretation argument, but that reliance is misplaced. 48 U.S.C. § 2141. The Bondholders argue that, because PROMESA requires the Board to develop a "Fiscal Plan" that "respect[s] the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to June

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[18] Security Industrial Bank did not address any issues regarding PROMESA or the application of an existing bankruptcy provision to a previously unprotected debtor.

30, 2016," id. § 2141(b)(1)(N), Congress intended that PROMESA not alter the "status quo" existing before PROMESA's enactment. But this provision governs only the Board's Fiscal Plan, not the operation of Title III of PROMESA. We cannot read it to find Congress did not intend for § 552 to apply retroactively, in light of the express language earlier. We reject the Bondholders' prospective construction argument.

VI.
Conclusion

We emphasize that we decide each of these three claims narrowly, based on these specific facts.

Affirmed. Costs are awarded to the Board.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1699

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Defendants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE

FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND; ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; NOKOTA CAPITAL MASTER FUND, L.P.,

Defendants.

No. 19-1700

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.;

TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Defendants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

ERRATA SHEET

The opinion of this Court, issued on January 30, 2020, is amended as follows:

On page 19, line 5, insert a new footnote after "Enabling Act".

> We are not faced with and do not decide the issues pending before the Title III court concerning liens on prepetition Additional Uniform Contributions. See Adversary Complaint, Fin. Oversight & Mgmt. Bd. for P.R. v. Glendon Opportunities Fund LP (In re Fin. Oversight & Mgmt. Bd. for P.R.), No. 19-00367-LTS (D.P.R. May 20, 2019), ECF No. 1.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1699

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Defendants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-

BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND; ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; NOKOTA CAPITAL MASTER FUND, L.P.,

Defendants.

No. 19-1700

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.;

TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Defendants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

JUDGMENT

Entered: January 30, 2020

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Costs are awarded to the Financial Oversight and Management Board for Puerto Rico.

By the Court:

Maria R. Hamilton, Clerk

cc:

Alfredo Fernandez-Martinez
Geoffrey S. Stewart
Sparkle Leah Sooknanan
Beth Heifetz
Benjamin Rosenblum
Bruce Bennett
Parker Andrew Rider-Longmaid
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William D. Dalsen
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Kevin J. Perra
Antonio Juan Bennazar-Zequeira
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Robert D. Gordon
Catherine Steege
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Carla Garcia-Benitez
Ubaldo M. Fernandez
Daniel Jose Perez-Refojos
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Stephan E. Hornung
Chad Golder
Michael A. Firestein
Lary Alan Rappaport
Ginger D. Anders
Jennifer L. Roche
Rachel G. Miller Ziegler
Guy Brenner
Ralph C. Ferrara
Ann M. Ashton
Andres W. Lopez
Raul Castellanos-Malave
Joseph P. Davis III
Katiuska Bolanos-Lugo Michael S. Raab
Mark R. Freeman
Michael Shih

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

In re:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	PROMESA Title III
as representative of	
THE COMMONWEALTH OF PUERTO RICO, et al.,	Case No. 17 BK 3283-LTS (Jointly Administered)
Debtors.[1]	

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO, Debtors.	Case No. 17 BK 3566-LTS
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of, THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO, Plaintiff, -against- ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY, et al., Defendants-Counterclaimants.	Adv. Proc. No. 17-213-LTS

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT III AND COUNTERCLAIMS II AND III, AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Counsel for Defendants Puerto Rico AAA Portfolio Bond Fund, Inc., Puerto Rico AAA Portfolio Bond Fund II, Inc., Puerto Rico AAA Portfolio Target Maturity Fund, Inc., Puerto Rico Fixed Income Fund, Inc., Puerto Rico Fixed Income Fund II, Inc., Puerto Rico Fixed Income Fund III, Inc.,

Puerto Rico Fixed Income Fund IV, Inc., Puerto Rico Fixed Income Fund V, Inc., Puerto Rico GNMA & U.S. Government Target Maturity Fund, Inc., Puerto Rico Investors Bond Fund I, Puerto Rico Investors Tax-Free Fund, Inc., Puerto Rico Investors Tax-Free Fund, Inc. II, Puerto Rico Investors Tax-Free Fund III, Inc., Puerto Rico Investors Tax-Free Fund IV, Inc., Puerto Rico Investors Tax-Free Fund V, Inc., Puerto Rico Investors Tax- Free Fund VI, Inc., Puerto Rico Mortgage-Backed & U.S. Government Securities Fund, Inc., Tax-Free Puerto Rico Fund, Inc., Tax-Free Puerto Rico Fund II, Inc., Tax-Free Puerto Rico Target Maturity Fund, Inc., and UBS IRA Select Growth & Income Puerto Rico Fund

LAURA TAYLOR SWAIN,
United States District Judge

The Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS" or "Plaintiff"), by and through the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), commenced this adversary proceeding against certain secured bondholders of ERS (the "Defendants" or the "Bondholders"[2]) pursuant to the terms of a stipulation entered into by the parties on July 14, 2017. (See Docket Entry No. 40 in Adversary Proceeding No. 17-00213,[3] Ex. B (the "Stipulation").) The terms of the Stipulation provided, in relevant part, that on or before July 21, 2017, ERS "shall file an adversary complaint with this Court, seeking solely declaratory relief regarding . . . the validity, priority, extent and enforceability of the prepetition and postpetition liens and security interests asserted by the Bondholders with respect to the ERS Bonds." (Stip. ¶ 6.A.) The Stipulation further provided, in relevant part, that the Bondholders "shall have the right, but not the obligation, to counterclaim on . . . matters pertinent to the main claims." (Id.) ERS filed the Complaint on July 21, 2017, seeking declarations con-

---

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the *Adversary Complaint* (Docket Entry No. 1, the "Complaint"). The parties' claims and counterclaims relating to Altair Global Credit Opportunities Fund (A), LLC and Nokota Capital Master Fund, L.P. were dismissed without prejudice pursuant to the *Order Regarding Dismissal Without Prejudice of Certain Defendants-Counterclaimants Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) and Fed. R. Bankr. P. 7041* (Docket Entry No. 234).

[3] All docket entry references are to entries in Adversary Proceeding No. 17-00213, unless otherwise specified.

cerning the scope, validity, and perfection of Defendants' asserted security interest. Defendants filed the *Answer and Counterclaims* (Docket Entry No. 36, the "Answer"), asserting nine counterclaims seeking declaratory relief with respect to the scope, validity, and perfection of their asserted security interest. On November 3, 2017, the parties filed cross-motions for summary judgment. (See Docket Entry No. 91, the "Plaintiff's Motion" and Docket Entry No. 94-1, the "Defendants' Motion.")

On August 17, 2018, this Court issued the *Opinion and Order Granting and Denying in Part Cross Motions for Summary Judgment* ("MSJ Order"), granting in part summary judgment in favor of ERS and denying Defendants' Motion in its entirety. See Financial Oversight & Mgmt. Bd. for P.R. v. Altair Glob. Credit Opportunities Fund (a), LLC, et al. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 590 B.R. 577 (D.P.R. 2018). The Court based its decision principally on the finding that Defendants did not possess a perfected security interest in any of the Pledged Property as defined in the Resolution. On appeal, the United States Court of Appeals for the First Circuit reversed and vacated this Court's determination regarding perfection, holding instead that Defendants had "satisfied the filing requirements for perfection as of December 17, 2015," and remanded for further proceedings two of Defendants' counterclaims that had not yet been addressed in light of the previous disposition. Altair Glob. Credit Opportunities Fund (a), LLC v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 914 F.3d 694, 703 (1st Cir. 2019).

Following remand, the parties jointly requested that the Court determine an issue encompassed by

Count III of the Complaint and Counterclaims II and III of the Answer that had been briefed by the parties in connection with their cross-motions for summary judgment but was not addressed by the Court in its MSJ Order.[4] This issue, defined by the parties as the "Section 552 Issue," concerns the "applicability of Section 552(a) of the Bankruptcy Code and whether it prevented any security interest from attaching to revenues received by ERS during the post-petition period" and is now ripe for adjudication. (Docket Entry No. 247, *Joint Informative Motion Regarding Recommended Procedure Concerning Filing of the Employees Retirement System of the Government of the Commonwealth of Puerto Rico's Amended Complaint and Adjudication of Undecided Issue* (the "Joint Informative Motion"), at ¶ 3.) The parties agreed on the portion of the prior record upon which the Section 552 Issue should be determined, enumerating relevant materials in Exhibit B to the Joint Informative Motion.

The Court has considered carefully all of the arguments and submissions cited by the parties in connection with the Section 552 Issue. For the following reasons, summary judgment is granted in favor of ERS

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[4] Count III of the Complaint seeks a declaration that "section 552(a) . . . prevents any security interest from attaching to Revenues received by ERS during the postpetition period." (Compl. ¶ 143.) Counterclaim II of the Answer seeks a declaration that the Bondholders "hold valid, enforceable, attached, perfected, first priority liens on and security interests in the Pledged Property whether ERS became entitled to collect such property before or after the commencement of the ERS's Title III case." (Answer ¶ 247.) Counterclaim III of the Answer seeks a declaration that, "because the employer contributions constitute 'special revenues,' [the Bondholders'] security interest in and liens on employer contributions received by the ERS after the Petition Date remain enforceable pursuant to 11 U.S.C. § 928(a)." (Id. ¶ 257.)

and denied in favor of Defendants with respect to Count III of the Complaint and Counterclaims II and III of the Answer.

I. BACKGROUND

The following facts are undisputed unless otherwise indicated.[5] The Court found the following facts to be undisputed in its MSJ Order:

> On May 15, 1951, the legislature of the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico") enacted Act No. 447-1951 (codified, as amended, at 3 L.P.R.A. §§ 761–788, the "Enabling Act"). (Pl.'s 56(b) ¶ 1; Defs.' 56(b) ¶ 10.) The Enabling Act established ERS to administer the payment of pensions and certain other benefits for the retired employees of the Commonwealth, certain public corporations in Puerto Rico, and certain municipalities. See 3 L.P.R.A. § 761 (2016). As originally codified, the official English-language version of the Enabling Act denominated the retirement and benefits system as the "Employees Retirement System of the Insular Government of Puerto Rico and its

[5] Facts characterized as undisputed are identified as such in the parties' statements pursuant to D.P.R. Local Civil Rule 56(b) or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the parties' respective Local Civil Rule 56(b) Statements (Docket Entry No. 95 ("Defs.' 56(b)") or Docket Entry No. 93 ("Pl.'s 56(b)")) incorporate by reference the parties' citations to underlying evidentiary submissions. The Court declines to address assertions proffered by the parties that are immaterial or conclusory statements of law which the parties proffer as facts.

Instrumentalities." (Docket Entry No. 92, the "Possinger Declaration," Ex. 1.)[6]

The Enabling Act provides that ERS may both issue debt and secure such debt with the assets of ERS. On January 24, 2008, ERS issued senior and subordinate pension funding bonds (collectively, the "ERS Bonds") pursuant to a Pension Funding Bond Resolution (Compl., Ex. D, the "Resolution"). (Pl.'s 56(b) ¶ 4; Defs.' 56(b) ¶ 22.) Pursuant to the Resolution, the holders of the ERS Bonds (the "ERS Bondholders" or "Bondholders") were granted a security interest in certain "Pledged Property." Specifically, Pledged Property is defined in the Resolution to include the following:

1. All Revenues.
2. All right, title and interest of the System in and to Revenues, and all rights to receive the same.
3. The Funds, Accounts, and Subaccounts held by the Fiscal Agent, and moneys and securities and, in the case of the Debt Service Reserve Account, Reserve Account Cash Equivalents, from time to time held by the Fiscal Agent under the terms of this Resolution, subject to the application thereof as provided in this Resolution and

[6] The official English-language version of the Enabling Act, as amended in 2013, designates the retirement and benefits system as the "Retirement System for Employees of the Government of the Commonwealth of Puerto Rico." See 3 L.P.R.A. § 761 (2016).

to the provisions of Sections 1301 and 1303.

4. Any and all other rights and personal property of every kind and nature from time to time hereafter pledged and assigned by the System to the Fiscal Agent as and for additional security for the Bonds and Parity Obligations.

5. Any and all cash and non-cash proceeds, products, offspring, rents and profits from any of the Pledged Property mentioned described in paragraphs (1) through (4) above, including, without limitation, those from the sale, exchange, transfer, collection, loss, damage, disposition, substitution or replacement of any of the foregoing.

(Resolution at VI-36.) The Resolution defines "Revenues" as follows:

1. All Employers' Contributions[7] received by the System or the Fiscal Agent.

2. With respect to any particular Bonds, the proceeds of any draw on or payment under any Credit Facility which is intended for the payment of such Bonds, but only for purposes of such payment and not for other purposes of this Resolution.

---

[7] The Resolution provides that "Employers' Contributions shall mean the contributions paid from and after the date hereof that are made by the Employers and any assets in lieu thereof or derived thereunder which are payable to the System pursuant to Sections 2-116, 3-105 and 4-113 of the [Enabling] Act." (Resolution at VI-33.)

3. Net amounts received by the System pursuant to a Qualified Hedge.

4. Income and interest earned and gains realized in excess of losses suffered by any Fund, Account, or Subaccount held by the Fiscal Agent under the terms of this Resolution, subject to the provisions of Sections 1301 and 1303.

5. Any other revenues, fees, charges, surcharges, rents, proceeds or other income and receipts received by or on behalf of the System or by the Fiscal Agent lawfully available for the purposes of this Resolution and deposited by or on behalf of the System or by the Fiscal Agent in any Fund, Account, or Subaccount held by the Fiscal Agent under the terms of this Resolution, subject to the provisions of Sections 1301 and 1303.

(Id. at VI-37.)

The Resolution is publicly available both electronically on the websites of the Government Development Bank, ERS, and the Electronic Municipal Market Access System, and in the hard copy records of ERS. (Defs.' 56(b) ¶ 42; see also Docket Entry No. 116, "Plaintiff's 56(b) Response," ¶ 42.)

On June 2, 2008, ERS executed a security agreement (Compl., Ex. E, the "Security Agreement") in connection with the Resolution. The Security Agreement grants, for the benefit of the ERS Bondholders, "a security interest in (i) the Pledged Property, and (ii) all

> proceeds thereof and all after-acquired property, subject to application as permitted by the Resolution." (Id.) The Security Agreement does not include a definition of the term "Pledged Property," instead providing that "[a]ll capitalized words not defined herein shall have the meanings ascribed to them in the Resolution." (Id.)

In re Fin. Oversight & Mgmt. Bd. for P.R., 590 B.R. at 583-85.

As noted in footnote 7 above, the Resolution defines "Employers' Contributions" as "contributions paid from and after the date hereof that are made by Employers," as well as "any assets in lieu thereof or derived thereunder which are payable to [ERS] pursuant to Sections 2-116, 3-105 and 4-113 of the [Enabling] Act."[8] (Pl.'s 56(b) ¶ 8; Defs.' 56(b) ¶ 31.) The Resolution further provided that, upon adoption of the Resolution, the Pledged Property was "immediately . . . subject to the lien of th[e] pledge, assignment and security interest without any physical delivery thereof or further act," and the security interests in and liens

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[8] At the time of the ERS Bond Resolution, Section 2-116 of the Enabling Act set forth various provisions governing Employers' Contributions, including the requirement that "the employer shall contribute to [ERS] a minimum percentage equal to 9.275% of the compensation regularly received by the participants." 3 L.P.R.A. § 781(d) (2008). Section 3-105 of the Enabling Act provided that every employer "shall compulsorily contribute to [ERS] a sum equal to . . . 9.275% of the salary of each participant of the Program as long as the participant is an employee." 3 L.P.R.A. § 786-5 (2008). Section 4-113 of the Enabling Act provides that "the contributions required from the employer, as well as all annuities, benefits, reimbursements, and administration expenses, shall constitute obligations of the employer." 3 L.P.R.A. § 787 (2008).

on the Pledged Property became "valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the [ERS], irrespective of whether such parties have notice thereof." (Defs.' 56(b) ¶ 33.) At the time of the adoption of the Resolution in 2008, the ERS Enabling Act required employers to contribute a set percentage of the contribution of each employee participant during the term of the participant's employment to ERS. (Pl.'s 56(b) ¶ 9, Defs.' 56(b) ¶ 15; see also 3 L.P.R.A. § 781(d) (2008).) In 2013, the legislature of Puerto Rico enacted Act 3-2013, which amended the Enabling Act effective July 1, 2013.

Two UCC-1 financing statements were filed with the Department of State of the Government of Puerto Rico (the "Department of State") in 2008, and two amendment forms corresponding to each of the 2008 UCC-1s were received by the Department of State on or about December 17, 2015. (Pl.'s 56(b) ¶¶ 18, 23, 29.) Although the 2008 financing statements were insufficient to perfect the security interest under P.R. Laws Ann. Tit. 19, § 2152(1) (2008), the 2015 financing statement amendments met the requirements for perfection as of December 17, 2015. See In re Fin. Oversight & Mgmt. Bd. for P.R., 914 F.3d at 710, 719. Additionally, both the Commonwealth and the Oversight Board acknowledged the validity of the Bondholders' security interests and liens in court filings at various times prior to the commencement of proceedings for ERS under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2194. (Defs.' 56(b) ¶ 59 (citing Commonwealth's Br. in Opp'n, Altair Glob. Credit Opportunities Fund (A), LLC, et al. v. Governor Alejandro Garcia Padilla, et al., No. 16-cv-2696 (D.P.R.), Docket Entry No. 53, at 5 (stating that the

"security interest and lien in favor of the ERS bondholders is indefinite, and ends only upon satisfaction of ERS's outstanding debt obligations"); Oversight Board's Br. in Opp'n, Altair Glob. Credit Opportunities Fund (A), LLC, et al. v. Governor Alejandro Garcia Padilla, et al., No. 16-cv-2696 (D.P.R.), Docket Entry No. 56, at 12 (stating that the "perpetual revenue streams that secure [the Bondholders'] claims would still be available for future payments under yet-to-be negotiated fiscal plans or in future proceedings under PROMESA")).)

On May 21, 2017, a petition under Title III of PROMESA was filed on behalf of ERS. Section 301 of PROMESA incorporates certain sections of the Bankruptcy Code, which is codified in Title 11 of the United States Code, including Bankruptcy Code Sections 552, 902 (in part), and 928. As of July 1, 2017, ERS stopped receiving Employers' Contributions due to the implementation of the 2017 Commonwealth Pay-Go statute, under which the Commonwealth pays public pensions and various government entities reimburse the Commonwealth for those payments. This Opinion and Order does not address the legal status of payments made under the Pay-Go system, which are currently the subject of a related contested matter. (See *Motion of Certain Secured Creditors of the Employees Retirement System of the Government of the Commonwealth of Puerto Rico for Relief from the Automatic Stay*, Docket Entry No. 289 in Case No. 17-3566 (and related pleadings).)

II. DISCUSSION

The pending motions are brought pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.[9] Under Rule 56(a), summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that "possess[] the capacity to sway the outcome of the litigation under the applicable law," and there is a genuine factual dispute where an issue "may reasonably be resolved in favor of either party." Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) (internal quotation marks and citations omitted). The Court must "review the material presented in the light most favorable to the non-movant, and [] must indulge all inferences favorable to that party." Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990) (internal quotation marks and citations omitted). When a properly supported motion for summary judgment is made, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (internal quotation marks and citation omitted). The non-moving party can avoid summary judgment only by providing properly supported evidence of disputed material facts. LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841-42 (1st Cir. 1993). Where the parties have made cross-motions for summary judgment, the court applies these principles in evaluating each motion.

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[9] Federal Rule of Civil Procedure 56 is made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. See 48 U.S.C. § 2170.

The Court will first address the application of Section 552 of the Bankruptcy Code to Defendants' liens in the Pledged Property.

A. Section 552 of the Bankruptcy Code

Count III of the Complaint seeks a declaration that "section 552(a) of the Bankruptcy Code prevents any security interest from attaching to Revenues received by ERS during the postpetition period." (Compl. ¶ 143.) Counterclaim II of Defendants' Answer seeks a declaration that "the ERS Bondholders[] hold valid, enforceable, attached, perfected, first priority liens on and security interests in the Pledged Property whether ERS became entitled to collect such property before or after the commencement of the ERS's Title III case." (Answer ¶ 247.)

Section 552(a) of the Bankruptcy Code, made applicable in the above-captioned Title III cases by 48 U.S.C. § 2161(a), provides as follows:

> Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

11 U.S.C.A. § 552(a) (West 2016). Section 552(a) thus establishes a "general rule . . . that property acquired by the bankruptcy estate post-petition is not subject to any lien resulting from a pre-petition security agreement." In re Nat'l Promoters & Servs., Inc., 499 B.R. 192, 205 (Bankr. D.P.R. 2013); see also Wheeling & Lake Erie Ry. Co. v. Keach (In re Montreal, Me. & Atl. Ry., Ltd.), 799 F.3d 1, 7 (1st Cir. 2015). "The purpose of [the] general rule of invalidating after-acquired property clauses is to facilitate the debtor's

fresh start, rehabilitation, and reorganization by allowing the debtor to include as much property as possible in the estate to satisfy the claims of general creditors." In re Nat'l Promoters & Servs., Inc., 499 B.R. at 205.

Section 552(b)(1) establishes an exception to Section 552(a):

> Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C.A. § 552(b)(1) (West 2016). By virtue of this exception, "if a security agreement entered before the commencement of the case extends 'to proceeds, product, offspring or profits' of the original collateral, then the security interest continues to apply to the proceeds and so on, even when they are acquired by the debtor or estate after the bankruptcy case begins." Johnson v. Cottonport Bank, 259 B.R. 125, 128 (W.D. La. 2000). Among other things, Defendants contend that, because the Resolution provides a security interest in Pledged Property consisting of Revenues "and

all rights to receive the same," and "Revenues" are defined to include Employers' Contributions and all cash and non-cash proceeds from the Pledged Property, the Resolution establishes that Defendants have broad liens that encompass contributions that have already been made as well as rights to future contributions and all proceeds of those rights. (Defs.' Mot. ¶¶ 41-42.) According to Defendants, the "proceeds" of such rights include payments or collection of contributions from employers. (Id. ¶ 48.) Defendants argue that their pre-petition collateral includes the right to receive future contributions, and therefore all such contributions—whenever made—are the proceeds of that pre-petition right. (Docket Entry No. 120, the "Defendants' Opposition," at ¶¶ 46-49.) According to the Bondholders, Section 552(b)(1) therefore renders Section 552(a) inapplicable to ERS's right to receive such contributions after the petition date. (Defs.' Mot. ¶ 47.)

Significantly, Section 552(b)(1)'s exception to Section 552(a)'s general rule only extends to "property of the debtor acquired before the commencement of the case" and the "proceeds, products, offspring, or profits of such property." 11 U.S.C.A. § 552(b)(1) (West 2016). Put another way, Section 552(b)(1) does not extend to the proceeds of property which itself is acquired after the petition date. Thus, the crux of the issue now before the Court is whether post-petition contributions constitute property acquired after the petition date or the proceeds of pre-petition collateral.

The parties have identified no binding authority governing the question of whether post-petition Employers' Contributions to ERS are protected by Section 552(b)(1), nor has the Court's own research disclosed

any such authority. Accordingly, the Court has considered carefully lower court decisions and the provisions of the relevant Resolution and statutes in determining the issue before it.

The instant factual context is analogous to that of In re HRC Joint Venture, 175 B.R. 948 (Bankr. S.D. Ohio 1994), where the creditor, TIAA, had a security interest in "the remittances to be made by Hyatt to the debtor under [a] Management Agreement." 175 B.R. at 952. In that case, the remittances to the debtor—which owned the building that housed a hotel— were generated by the post-petition acts of a third party—Hyatt Corporation—which operated the hotel in the debtor's building. Id. at 949. The court held that the remittances were after-acquired property subject to Section 552(a) and that the proceeds exception in Section 552(b) did not apply because "it is only post-petition acts which generated the collateral of TIAA in question, debtor's right to remittances each month under the Management Agreement." Id. at 953.

Here, the Employers' Contributions were calculated, at least in part, based upon the contributing employers' respective payrolls. The parties have identified three components of employers' obligations to ERS. (Docket Entry No. 199, the "Defendants' Supplemental Memorandum," at ¶ 10; Docket Entry No. 204 at 6-7.) The first component, referred to by Defendants as the Percentage of Payroll Contribution, is a regular contribution calculated as a percentage of an employer's payroll. See 3 L.P.R.A. § 787f. The second, referred to by Defendants as the Supplemental Contribution, is based upon the number of the employer's current pensioners as of the time of computation. See Act 3-2013 § 38; 3 L.P.R.A. § 761. The third, referred

to by Defendants as the Additional Uniform Contribution, is based on the proportion of total employer contributions corresponding to each employer in a particular year. See 3 L.P.R.A. § 787q. Accordingly, all three components of contributions by employers are contingent on quantitative factors relating to each employer's workforce.

However, because the Additional Uniform Contribution varies each year (by reference to actuarial determinations and each employer's workforce demographics) to ensure that a certain level of assets is available for ERS, Defendants argue that changes in an employer's workforce would not affect the employer's overall obligations. (Defs.' Supp. Mem. ¶¶ 11-14 ("This standing obligation to make statutory contributions is not contingent on current employee labor, even if the mix of components of that obligation may change with changes to the employer's current payroll.").) Defendants also point to examples of statutory text expressing an intention or goal of setting overall contributions to ERS at a level adequate to pay benefits and administrative costs, less contributions by employees. (Docket Entry No. 206 at ¶¶ 24-25.) However, the fact that statutory provisions state a goal of ensuring that contributions from employers are adequate to support ERS's cash flow does not mean that any particular employer's obligations are fixed. Rather, each employer's Percentage of Payroll Contribution, Supplemental Contribution, and Additional Uniform Contribution will vary based upon the size of an employer's payroll, the number of an employer's former employees, and actuarial factors. Thus, the employers' obligations remain inchoate until such time as the Employers' Contributions are calculated.

Thus, similar to Defendants here, the creditor in HRC Joint Venture had been granted a pre-petition security interest in expected future remittances. Id. at 952. Furthermore, as here, the right to receive particular future remittances arose based on post-petition events. In HRC Joint Venture, those rights were the rights to revenue from the management agreement; here, those rights are to funds payable by employers that are calculated based upon certain factors relating to their postpetition workforce demographics and payroll obligations. These employers' specific contribution payment obligations are not fixed and unchanging with respect to each employer, but, rather, are calculated based upon certain workforce demographic factors and actuarial determinations. Until the post-petition computations are performed based upon post-petition facts, the receivable to ERS does not exist and ERS has no right to collect the particular contribution. Thus, the relevant right to payment only comes into existence as the result of and contemporaneously with post-petition acts, and the proceeds of that right are therefore the proceeds of post-petition property; ERS's right to payment of the post-petition property is not "property of the debtor acquired before the commencement of the case." 11 U.S.C. § 552(b)(1). The proceeds of that post-petition property therefore are outside of the ambit of Section 552(b)(1). See HRC Joint Venture, 175 B.R. at 954; see also Local Loan Co. v. Hunt, 292 U.S. 234, 243 (1934) ("The earning power of an individual is the power to create property; but it is not translated into property within the meaning of the bankruptcy act until it has brought earnings into existence."); Arkison v. Frontier Asset Mgmt., LLC (In re Skagit Pac. Corp.), 316 B.R. 330, 336 (B.A.P. 9th Cir. 2004) ("[W]here it is only post-petition acts which generate

an account receivable, those post-petition receivables will not be considered proceeds because there is no interest in, or connection to, the right in the account receivable created pre-petition."); In re Texas Tri-Collar, Inc., 29 B.R. 724, 726–27 (Bankr. W.D. La. 1983) ("[A]ccounts receivable generated after commencement of the case are in no way proceeds, product, offspring, rents or profits of prepetition accounts receivable . . . .").

Although Defendants cite to case law for the proposition that post-petition collection of accounts receivable can be proceeds of property subject to pre-petition security agreements under Section 552(b)(1), those cases are not persuasive here because they concern the collection of receivables generated by the sale or other disposition of pre-petition property. See In re Bumper Sales, Inc., 907 F.2d 1430, 1432, 1439 (4th Cir. 1990) (holding that Section 552(b)(1) extended to the post-petition proceeds of sale of pre-petition inventory and to inventory purchased with the post-petition proceeds); In re Sunberg, 729 F.2d 561, 562-63 (8th Cir. 1984) (holding that Section 552(b)(1) extended to governmental farm subsidies acquired after the petition date under a pre-petition contract providing for specific compensation for the non-crop use of farmland). Such proceeds of pre-petition collateral clearly fall within the scope of Section 552(b)(1). That factual context is materially different from the instant scenario, where the amount of Employers' Contributions from each employer remain unfixed until they become calculable and payable.[10]

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[10] Comparisons to Johnson v. Cottonport Bank, 259 B.R. 125 (W.D. La. 2000) fail for substantially the same reason. There, the district court, applying Louisiana law, determined that the debtor's right to receive a payment from a tribe was a property

Defendants' citation to Cadle Co. v. Schlichtmann, 267 F.3d 14 (1st Cir. 2001) is similarly unavailing. In that case, a creditor (Cadle) held a pre-petition security interest in a contingency fee to be paid to a law firm at the conclusion of a particular litigation referred to as the "Groton Matter." 267 F.3d at 16. A settlement agreement was approved by a state court with respect to the Groton Matter in 1991, and the settlement proceeds had been deposited into an escrow account prior to the commencement of the relevant bankruptcy case, "with distribution subject to the settlement's approval by the Massachusetts Department of Environmental Protection." Id. In 1991, one of the firm's partners (Schlichtmann) filed for Chapter 7 bankruptcy protection and, subsequently, the firm was dissolved. Id. Thereafter, Schlichtmann agreed to take over the Groton Matter in exchange for one-third of the fee received on it. Id. at 19. Following further work on the Groton Matter by Schlichtmann, the matter was entirely resolved and a portion of the settlement proceeds were transferred to Schlichtmann, who distributed a portion to his former partners. Id. at 16. Cadle—which had received no portion of that distribution—commenced litigation against Schlichtmann and his former partners. Id. The First Circuit held that Cadle had a right to the portion of the Groton Matter fee that Schlichtmann had retained. Id. at 17. The distribution of the settlement proceeds was governed by a pre-petition agreement between the law firm and the plaintiffs in the Groton Matter. Id. The entirety of those amounts was depos-

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right that existed prior to the petition date. 259 B.R. at 130-31. Thus, the payments received pursuant to that right—which were not subject to variance or recalculation from month to month—were proceeds of a pre-petition property right.

ited in escrow prior to commencement of Schlichtmann's Chapter 7 case, and, according to the First Circuit, the pre-petition letter that was the source of Cadle's security interest in the receivable "ma[de] clear that the parties intended an assignment of a security interest in sums in escrow, not in future fees." Id. at 18 n.3. Although the First Circuit stated that Schlichtmann's post-petition efforts on the Groton Matter were not relevant to its analysis, its reasoning emphasized that "the amount of the fee owed to the firm . . . was established outside of Schlichtmann's bankruptcy," id. at 19, and that there was no substantial further performance owed by either Schlichtmann or his law firm with respect to the Groton Matter. Id. at 21. According to the First Circuit, Schlichtmann's efforts were not relevant (notwithstanding the general rule that "ordinarily post-petition earnings belong to the petitioner who has sought bankruptcy protection," id.) because "in this instance, the firm, through Schlichtmann, gave the bank an unqualified security interest in a specific fund (i.e., the attorneys' fee share of the settlement) . . . which was paid into [an escrow] account well before Schlichtmann declared bankruptcy." Id. ("Nothing in the commitment by Schlichtmann suggested, so far as the bank was concerned, that the fees or the security interest were contingent on the performance of substantial further legal services from the firm or from Schlichtmann."). Cadle thus concerned the distribution of specific proceeds that were deposited in escrow and which were subject to an agreed allocation prior to the petition date. No such fund or pledge of an interest in such a pre-petition fund underlies the Bondholders' post-petition security claim to post-petition proceeds. Rather, at the time that ERS's Title III petition was filed, the relevant public employees had not even performed

the labor generating the payroll upon which their employers' post-petition ERS contribution obligations would be computed.

The foregoing decisions persuade the Court that Section 552(b)(1) protects post-petition attachment of security interests in property acquired after the petition date where that property constitutes the proceeds of collateral that was fixed in form or quantity and owned by the pledgor pre-petition. Subsequent events, such as sales of pre-petition inventory or automatic payments of fixed amounts pursuant to pre-petition contractual rights, may generate post-petition proceeds that are protected by Section 552(b)(1) because their value is traceable to and calculable by reference to the pre-petition property without any additional post-petition labor or other intervening value-defining or -adding action. Here, the relevant statutory provisions made the accrual and computation of the employers' contribution obligations contingent upon their contemporaneous payrolls, workforce demographics, and the actuarial funding status of ERS. ERS therefore gained rights to collect the particular amounts once they could be computed, and there is nothing in the record to indicate the employers' actual post-petition contribution liabilities were the product of anything other than computations based on then-current payrolls, demographics, and actuarial factors. Accordingly, the contributions acquired post-petition were not proceeds of ERS's inchoate pre-petition right to receive future contributions computed by reference to yet-to-be determined post-petition circumstances.

B. Section 928(a) of the Bankruptcy Code

Counterclaim III of Defendants' Answer seeks a declaration that, "because the employer contributions constitute 'special revenues,' their security interest in

and liens on employer contributions received by the ERS after the Petition Date remain enforceable pursuant to 11 U.S.C. § 928(a)." (Answer at ¶ 257.) Section 928 of the Bankruptcy Code provides another exception from the general rule established by Bankruptcy Code Section 552(a), stating that, "[n]otwithstanding section 552(a) of this title and subject to subsection (b) of this section, special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C.A. § 928(a) (West 2016).[11] "Special revenues" are defined, as here relevant, in Section 902(2)(A) and 902(2)(D) of the Bankruptcy Code as follows:

> 902(2)(A): "receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems"
>
> 902(2)(D): "other revenues or receipts derived from particular functions of the debtor, whether or not the debtor has other functions."

11 U.S.C.A. § 902 (West 2016).

The Bondholders contend that Employers' Contributions are "special revenues" within the meaning of both Sections 902(2)(A) and/or 902(2)(D) and are therefore exempt from Section 552(a).

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[11] Bankruptcy Code Section 928 is made applicable in these Title III proceedings by Section 301 of PROMESA.

Defendants argue that the Pledged Property constitutes "other revenues or receipts derived from particular functions of the debtor" within the meaning of Section 902(2)(D), characterizing the "particular functions" of ERS as "collecting and investing employer contributions and providing pension and other benefits to retired employees." (Defs.' Mot. ¶ 52.) Because ERS's "self-acknowledged function" is to collect and pay out pension payments, and because ERS is enabled to perform this function by its statutory right to receive employer contributions from the Commonwealth and other public corporations and municipalities, Defendants argue, employer contributions are "received" and thus "derived" from particular functions of ERS. (Id.) Defendants also contend that the Employee Retirement System is a "system" within the meaning of Section 902(2)(A) because it was "created by the Commonwealth to administer the payment of pensions and the delivery of other benefits for retired employees of public corporations." (Defs.' Mot. ¶ 53.)

ERS argues that the Employers' Contributions are not "special revenues" as defined in either subdivision of Section 902(2) relied upon by Defendants. First, ERS contends that Section 902(2)(A) "concerns special revenues from the operation of utility or transportation systems" (Pl.'s Mot. at 32) and does not cover a benefits trust such as ERS, asserting that Employers' Contributions are not derived from the ownership, operation, or disposition of a project or system used primarily to provide transportation, utility, or other services. ERS invokes the principle of ejusdem generis in support of the proposition that, where general words follow a designation of a particular subject, the meaning of those general words will include only things of the same type or nature as those particular subjects. (Pl.'s Mot. at 32-33.) ERS also contends that

the legislative history of Section 902(2)(A) confirms a limited interpretation of "other services."[12] (Id.) In response to Defendants' argument that Employers' Contributions fall within the meaning of Section 902(2)(A) because ERS's name includes the word "system," ERS asserts that such an interpretation would expand the scope of services subject to Section 902(2)(A) in a manner that ignores Congress's specification of "transportation" and "utility" services in the definition, and that Defendants have failed to identify any case law expanding the scope of "special revenues" beyond a form of utility or transportation service. (Docket Entry No. 115, the "Plaintiff's Opposition," at 28.)

Second, ERS argues that the Revenues do not constitute special revenues under Section 902(2)(D) because the "particular functions" of ERS are to "collect and pay out pension payments to certain public retirees." (Pl.'s Opp. at 29.) ERS asserts that Employers' Contributions are not "derived from" these "particular functions" of ERS and are instead derived from the labor of employees and used to fund the payment of pension benefits. (Pl.'s Mot. at 34.) Thus, ERS argues that Employers' Contributions are not a result of any services provided by ERS within the meaning of Section 902(2)(D). (Pl.'s Opp. at 29.)

The Court concludes that the Employers' Contributions are not "special revenues" within the meaning of either Section 902(2)(A) or Section 902(2)(D) of the

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[12] See, e.g., H.R. Rep. No. 100-1011, at 6 (1988) (The "first type [of special revenues], described in new subsection (2)(A), consists of receipts derived from the ownership or operation of a debtor's systems or projects used to provide transportation, utilities, or other services. It would include receipts from the operation of water, sewage, waste, or electric systems.").

Bankruptcy Code. "[W]here words of a particular or specific meaning are followed by general words, the general words are construed to apply only to persons or conditions of the same general kind as those specifically mentioned." Lyman v. Commissioner of Internal Revenue, 83 F.2d 811, 813 (1st Cir. 1936) (applying the principle of ejusdem generis to the statutory language "fires, storms, shipwreck, or other casualty"); see also McBoyle v. United States, 283 U.S. 25, 27 (1931). Here, the definition of special revenues as set forth in Section 902(2)(A) encompasses "projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services." Applying ejusdem generis as a principle of statutory interpretation to Section 902(2)(A) limits the meaning of "other services" to projects or systems of "the same general kind" as transportation or utility projects or systems. References to "transportation" and "utility" in this definition contemplate a physical system of providing services to third parties. ERS is a benefits trust that does not provide any "transportation" or "utility" services, the Employers' Contributions received by ERS are not calculated by reference to or otherwise tied to the provision of transportation, utility, or similar services, and ERS does not produce any product provided to employers in return for payments into its system. The Court therefore concludes that the term "other services" as included in the definition of special revenues set forth in Section 901(2)(A) does not encompass Employers' Contributions.

Nor are the Employers' Contributions "special revenues" as defined in Section 902(2)(D) of the Bankruptcy Code. The contributions are a means of collection and delivery of deferred compensation to Commonwealth employees, and ERS therefore functions

as a conduit for distribution of Employers' Contributions rather than as a provider of a "particular function" or service that itself produces revenue. There is no indication that ERS charges any fees for its services or that Pledged Property includes such fees. Nor, for substantially the same reasons explained in the preceding paragraph, are Employers' Contributions themselves revenues derived from the conduit function of ERS. Because the Employers' Contributions are not "special revenues" within the meaning of either Section 902(2)(A) or Section 902(2)(D) of the Bankruptcy Code, ERS is entitled as a matter of law to summary judgment dismissing Defendants' Counterclaim III.

C. Constitutional Avoidance

Defendants argue that the canon of constitutional avoidance mandates a construction of Section 552 of the Bankruptcy Code that renders it inapplicable to Defendants' pre-PROMESA security interests, thus avoiding the "grave and doubtful constitutional questions" raised by an interpretation of Section 552 that would "cut off" Defendants' liens on the Pledged Property. (Defs.' Mot. ¶ 54; Defs.' Opp'n ¶¶ 66-67 (citing Armstrong v. United States, 364 U.S. 40, 44, 46 (1960).)) Specifically, Defendants characterize PROMESA as a "new and unprecedented federal law that for the first time in the history of the United States terminates post-petition liens granted by United States Territories on after acquired [] property in some circumstances" and argue that the retroactive application of Section 552, as incorporated by Section 301 of PROMESA, to invalidate any of Defendants' property rights without just compensation would effectuate a taking in violation of the Takings Clause of the Fifth Amendment. (Defs.' Mot. ¶¶ 54, 59-61; Defs.'

Opp'n ¶ 66.) Defendants assert that this Court "should follow its 'duty' under the constitutional avoidance canon by 'adopt[ing] the latter' interpretation to avoid ruling on a serious constitutional question." (Docket Entry No. 150 at ¶ 31 (citing Jones v. United States, 529 U.S. 848, 857 (2000)).)

Under the canon of constitutional avoidance, a court, in deciding "which of two plausible statutory constructions to adopt . . . must consider the necessary consequences of its choice. If one [construction] would raise a multitude of constitutional problems, [then] the other [construction] should prevail . . . ." Clark v. Martinez, 543 U.S. 371, 380-81 (2005). However, the canon of constitutional avoidance is not a method of adjudicating constitutional questions. Id. at 381. Rather, it "is a tool for choosing between competing plausible interpretations of statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." Id. "The canon is thus a means of giving effect to congressional intent, not of subverting it." Id.

Defendants ask the Court to avoid an interpretation of Section 552 that would "cut off" their liens on the Pledged Property. However, it would be unreasonable to presume that Congress did not intend Section 552 to apply in these Title III cases to pre-existing liens in light of the express incorporation of Section 552 of the Bankruptcy Code into PROMESA through Section 301 of PROMESA. PROMESA was specifically enacted to enable Puerto Rico to address the unprecedented fiscal emergency that continues to plague the Commonwealth and its instrumentalities. This Court cannot subvert the clear intent of Congress by "choosing" a prospective interpretation of Section 552

that would disable a tool Congress provided in a statute specifically designed to be available to Puerto Rico. Defendants' request that the Court construe Section 552 as applicable only prospectively in the PROMESA Title III context is denied.

Accordingly, the Court holds that Section 552 applies to prevent the post-petition attachment of Defendants' liens.

III. CONCLUSION

For the foregoing reasons, summary judgment as to Count III of the Complaint and Counterclaims II and III of the Answer is granted in favor of Plaintiff. Defendants' summary judgment motion as to Count III and Counterclaims II and III is denied. The Court hereby declares that Bankruptcy Code Section 552 prevents any security interest resulting from liens granted in Defendants' favor prior to the commencement of ERS's Title III case from attaching to revenues received by ERS during the post-petition period. Counterclaims II and III are dismissed. In light of the preceding conclusions, Court need not address the parties' remaining arguments.

SO ORDERED.

Dated: June 27, 2019

/s/ Laura Taylor Swain

LAURA TAYLOR SWAIN
United States District
Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In Re: The Financial Oversight and Management Board for Puerto Rico as representative of The Commonwealth of Puerto Rico, et al., Debtors	3:17-BK-3283 (LTS) PROMESA Title III (Jointly Administered)

In Re: The Financial Oversight and Management Board for Puerto Rico as representative of The Employment Retirement System of the Government of the Commonwealth of Puerto Rico, Debtor	3:17-BK-3566 (LTS)

The Financial Oversight and Management Board for Puerto Rico as representative of Employees Retirement System of the Government of the Commonwealth of Puerto Rico, Plaintiff v. Andalusian Global Designated Activity Company, et al., Defendants	Adversary Proceeding No. 3:17-213 (LTS) in 3:17-BK-3566 (LTS)

FINAL JUDGMENT

Pursuant to the "OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT III AND COUNTERCLAIMS II AND III, AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT", filed on June 27, 2019 (Docket Entry #251), and the "ORDER DIRECTING THE CLERK OF COURT TO ENTER FINAL JUDGMENT", filed on July 8, 2019 (Docket Entry #252), the above captioned adversary proceeding is now closed.

SO ORDERED.

In San Juan, Puerto Rico, this 8th day of July, 2019.

Frances Ríos de Morán, Esq.
Clerk of Court

By: s/Carmen Tacoronte
Carmen Tacoronte
Deputy Clerk

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 19-1699

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.,

Defendants, Appellants,

PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-

BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND; ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; NOKOTA CAPITAL MASTER FUND, L.P.,

Defendants.

No. 19-1700

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Debtors.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRE-

SENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellee,

OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO,

Interested Party, Appellee,

v.

PUERTO RICO AAA PORTFOLIO TARGET MATURITY FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND, INC.; PUERTO RICO AAA PORTFOLIO BOND FUND II, INC.; PUERTO RICO FIXED INCOME FUND II, INC.; PUERTO RICO FIXED INCOME FUND III, INC.; PUERTO RICO FIXED INCOME FUND IV, INC.; PUERTO RICO FIXED INCOME FUND V, INC.; PUERTO RICO FIXED INCOME FUND, INC.; PUERTO RICO GNMA AND U.S. GOVERNMENT TARGET MATURITY FUND, INC.; PUERTO RICO INVESTORS BOND FUND I, INC.; PUERTO RICO INVESTORS TAX-FREE FUND II, INC.; PUERTO RICO INVESTORS TAX-FREE FUND III, INC.; PUERTO RICO INVESTORS TAX-FREE FUND IV, INC.; PUERTO RICO INVESTORS TAX-FREE FUND V, INC.; PUERTO RICO INVESTORS TAX-FREE FUND VI, INC.; PUERTO RICO INVESTORS TAX-FREE FUND, INC.; PUERTO RICO MORTGAGE-BACKED & U.S. GOVERNMENT SECURITIES FUND, INC.; TAX-FREE PUERTO RICO FUND II, INC.; TAX-FREE PUERTO RICO FUND, INC.; TAX-FREE PUERTO RICO TARGET MATURITY FUND, INC.,

Defendants, Appellants,

ALTAIR GLOBAL CREDIT OPPORTUNITIES FUND (A), LLC; ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY; GLENDON OPPORTUNITIES FUND, LP; MASON CAPITAL MASTER FUND LP; NOKOTA CAPITAL MASTER FUND, L.P.; OAKTREE OPPORTUNITIES FUND IX (PARALLEL 2), L.P.; OAKTREE OPPORTUNITIES FUND IX, L.P.; OAKTREE VALUE OPPORTUNITIES FUND, L.P.; OAKTREE-FORREST MULTI-STRATEGY, L.L.C. (SERIES B); OCHER ROSE, L.L.C.; SV CREDIT, L.P.; UBS IRA SELECT GROWTH & INCOME PUERTO RICO FUND,

Defendants.

Before
Howard, Chief Judge,
Torruella,* Lynch, Lipez, Thompson, Kayatta, and Barron,**
Circuit Judges.

ORDER OF COURT
Entered: March 3, 2020

The panel of judges who decided the case is of the view that the opinion should be amended therein. The amendment is reflected in an errata sheet ordered by the panel to issue, the opinion is hereby amended by the panel, and the petition for rehearing is otherwise denied.

---

* Judge Torruella is recused from this case and did not participate in the determination of this matter.

** Judge Barron is recused from this case and did not participate in the determination of this matter.

The petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc: Ginger D. Anders
Ann M. Ashton
Ehud Barak
Hermann D. Bauer-Alvarez
Antonio Juan Bennazar-Zequeira
Bruce Bennett
Martin J. Bienenstock
Katiuska Bolanos-Lugo
Guy Brenner
Wandymar Burgos-Vargas
Raul Castellanos-Malave
John K. Cunningham
Margaret Antinori Dale
William D. Dalsen
Joseph P. Davis III
Luis Francisco Del-Valle-Emmanuelli
Chantel L. Febus
Ubaldo M. Fernandez
Alfredo Fernandez-Martinez
Ralph C. Ferrara
Michael A. Firestein
David Robert Fox
Mark R. Freeman
Carla Garcia-Benitez
Ian Heath Gershengorn
Chad Golder
Robert D. Gordon

James M. Gross
Michael R. Hackett
Mark David Harris
Lindsay C. Harrison
Beth Heifetz
Stephan E. Hornung
Glenn Kurtz
Alicia Irene Lavergne-Ramirez
Richard B. Levin
Jeffrey W. Levitan
Andres W. Lopez
Michael Luskin
Rachel G. Miller Ziegler
Timothy W. Mungovan
Susana I. Penagaricano Brown
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Kevin J. Perra
Paul V. Possinger
Michael S. Raab
Lary Alan Rappaport
Stephen L. Ratner
Parker Andrew Rider-Longmaid
John E. Roberts
Jennifer L. Roche
Melissa M. Root
Benjamin Rosenblum
Jose Carlos Sanchez-Castro
Michael Shih
Sparkle Leah Sooknanan
Catherine Steege
Geoffrey S. Stewart
Maraliz Vazquez-Marrero
Donald B. Verrilli Jr.
Jason Zakia

APPENDIX G

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 552. Postpetition effect of security interest

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable non-bankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

(2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of

the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

* * *

3 L.P.R.A. § 761. Employees Retirement System Creation; effective and operative dates ; coordination with federal Social Security

Special provisions.

* * *

Sections 37, 38 and 40 of Act Apr. 4, 2013, No. 3, provide:

* * *

Section 38. The Additional Benefits Program for the Pensioners of the Retirement System for Employees of the Government of the Commonwealth of Puerto Rico is hereby established. Such benefits shall be separate from and shall not be part of any pension or annuity.

* * *

'Section 2. In order to cover the Additional Benefit Program and the Retirement System for Employees of the Government of the Commonwealth of Puerto Rico, beginning on fiscal year 2013-2014, and every subse-

quent fiscal year, the Retirement System for Employees of the Government of the Commonwealth of Puerto Rico shall receive a contribution equal to two thousand dollars ($2,000) as of July 1 of each year for every pensioner of the Retirement System for Employees of the Government of the Commonwealth of Puerto Rico who entered Public Service on or before December 31, 1999.

* * *

3 L.P.R.A. § 763(42). Employees Retirement System Definitions

The following terms and phrases as used in §§ 761-788 of this title, unless a different meaning is plainly required by the context, shall have the following meanings:

* * *

(42) Additional Uniform Contribution.— Shall mean (a) for purposes of fiscal year 2013-2014, one hundred forty million dollars ($140,000,000), and (b) for purposes of every fiscal year, beginning on fiscal year 2014-2015 and ending on fiscal year 2032-2033, the uniform contribution certified by an external actuary of the System within at least one hundred twenty (120) days prior to the beginning of said fiscal year, as necessary to prevent the value of the projected gross assets of the System from falling below one billion dollars ($1,000,000,000) during any subsequent fiscal year. If, for any reason, the certificate of the Additional Uniform Contribution for any fiscal year is not available within at least one hundred twenty (120) days prior to the beginning of a fiscal year, or within a shorter term as authorized by the Office of Management and Budget, the Additional

Uniform Contribution for said fiscal year shall be the Additional Uniform Contribution applicable to the immediately preceding fiscal year.

* * *

3 L.P.R.A. § 779(d) (2008). Employees Retirement System— Investment and reinvestment of reserves

(d) Authorization to incur debts.— The Board of Trustees may authorize the Administrator to seek a loan from any financial institution of the Government of the Commonwealth of Puerto Rico or the Federal Government of the United States of America or through the direct placement of debts, securing said debt with the assets of the System. The interest accrued by these obligations shall be exempt from the payment of income tax to the Commonwealth of Puerto Rico.

* * *

3 L.P.R.A. § 787f. Defined Contribution Hybrid Program Employer Contributions

Beginning on July 1, 2013, every employer shall mandatorily contribute to the System a sum equal to twelve point two hundred and seventy-five percent (12.275%) of the contribution of every Program participant while the participant is an employee. These contributions shall be deposited in the System in order to increase its level of assets, reduce its actuarial deficit, and improve its capacity to meet future obligations. From July 1, 2014 to June 30, 2016, the minimum employer contribution rate of twelve point two hundred and seventy-five percent (12.275%) shall increase annually on every subsequent July 1 by one percent (1%) of the compensation regularly earned by participants. From July 1, 2016 to June 30, 2021, the

minimum employer contribution rate as of June 30 of each year shall increase annually on every subsequent July 1 by one point twenty-five percent (1.25%) of the compensation regularly earned by participants. Provided, that the established increases applicable to municipalities for fiscal years 2012-2013 and 2013-2014 shall be included in the budget request submitted by the Office of Management and Budget to the Legislative Assembly for approval.

* * *

3 L.P.R.A. § 787q(b). Defined Contribution Hybrid Program Contribution equal to Additional Uniform Contribution

(b) For each fiscal year, the Retirement System Administration for the Employees of Government and the Judiciary shall: (i) determine the portion of the Additional Uniform Contribution corresponding to every employer participating in the System based on the percentage of the total employer contributions corresponding to such employer during the current fiscal year, and (ii) send to the Director of the Office of Management and Budget and each public corporation and municipalities whose employees are covered under this Act, a certificate stating the amount corresponding to such employer.

* * *

19 L.P.R.A. § 2212(a)(12), (42), (61), (64). Definitions and index of definitions

(a) In this chapter:

* * *

(12) Collateral.— Means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) accounts, chattel paper, payment intangibles, and promissory notes that have been sold, and

(C) goods that are the subject of a consignment.

* * *

(42) General intangible.— Means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, life insurance policies, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

* * *

(61) Payment intangible.— Means a general intangible under which the account debtor's principal obligation is a monetary obligation.

* * *

(64) Proceeds, except as used in § 2369(b) of title.— Means the following property:

(A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(B) whatever is collected on, or distributed on account of, collateral;

(C) rights arising out of collateral;

(D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral, or

(E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

* * *

19 L.P.R.A. § 2233(b)(2). Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites

(b) Enforceability.— Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

* * *

(2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party.

* * *

19 L.P.R.A. § 2308. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective

(a) Term restricting assignment generally ineffective.— Except as otherwise provided in subsection (b) of this section, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory

note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) Would impair the creation, attachment, or perfection of a security interest, or

(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) Applicability of subsection (a) to sales of certain rights to payment.— Subsection (a) of this section applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note, other than a sale pursuant to a disposition under § 2370 of this title or an acceptance of collateral under § 2380 of this title.

(c) Legal restrictions on assignment generally ineffective.— A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) Would impair the creation, attachment, or perfection of a security interest, or

(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security

interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) Limitation on ineffectiveness under subsections (a) and (c) of this section.— To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) of this section would be effective under law other than this chapter but is ineffective under subsection (a) or (c) of this section, the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

(1) Is not enforceable against the person obligated on the promissory note or the account debtor,

(2) does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;

(5) does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor, and

(6) does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(e) Section prevails over specified inconsistent law.—This section prevails over any inconsistent provisions of article 201 of the Political Code (3 L.P.R.A. § 902).

* * *

19 L.P.R.A. § 2402(a). Savings clause

(a) Pre-effective-date transactions or liens. Except as otherwise provided in this subchapter, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this act takes effect.

APPENDIX H

EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO

PENSION FUNDING BOND RESOLUTION

Adopted on January 24, 2008

BOND RESOLUTION

WHEREAS, Employees Retirement System of the Government of the Commonwealth of Puerto Rico (the "System") is a trust created pursuant to Act 447 of May 15, 1951, as amended (the "Act"), to provide pension and other benefits to retired employees of the central government, municipalities and public corporations of the Commonwealth of Puerto Rico;

WHEREAS, by virtue of the Act, the System has, among others, the duties and powers

(i) to incur debt secured by the assets of the System;

(ii) to receive and collect Employers' Contributions;

(iii) to make contracts and to execute all instruments necessary or convenient for the exercise of any of its powers; and

(iv) to sue and be sued, complain and defend in all courts of justice and administrative bodies;

WHEREAS, as of June 30, 2005, the System had an unfunded liability of approximately $9.9 billion pursuant to the System's actuarial evaluation report;

WHEREAS, the System's statutory right to receive Employers' Contributions is an obligation of the Employers and a legal asset of the System;

WHEREAS, as a legal asset of the System, the Employers' Contributions may be pledged to secure the debt of the System; and

WHEREAS, in order to decrease the unfunded liability of the System, the System wishes to issue limited, non-recourse obligations in the form of Bonds,

payable solely from the Pledged Property (as defined below), which includes the Employers' Contributions; now, therefore,

BE IT RESOLVED by the Board of Trustees of the System, as follows:

ARTICLE I
STATUTORY AUTHORITY

SECTION 101. Authority for this Resolution. This Resolution is adopted pursuant to the provisions of the Act.

SECTION 102. Resolution to Constitute Contract. In consideration of the purchase and acceptance of any and all of the Bonds authorized to be issued hereunder by those Persons who shall hold the same from time to time, this Resolution shall be deemed to be and shall constitute a contract among the System, the Owners from time to time of the Bonds and the Ancillary Facility Providers; and the security interest created in this Resolution and the covenants and agreements therein set forth to be performed on behalf of the System shall be for the equal benefit, protection and security of the Owners of any and all of the Bonds and the Ancillary Facility Providers, all of which shall be of equal rank without preference, priority or distinction of any of the Bonds and Ancillary Facility Providers over any other thereof, except as expressly provided in or permitted by this Resolution.

ARTICLE II
AUTHORIZATION AND ISSUANCE OF BONDS

SECTION 201. Authorization of Bonds. The System may issue hereunder one or more series of Bonds of the System to be designated as "Pension Funding Bonds," which Bonds may be issued as hereinafter

provided without limitation as to amount except as is or may hereafter be provided in this Resolution or in a Supplemental Resolution or as may be limited by law. There is hereby further created by this Resolution, in the manner and to the extent provided herein, a security interest and lien on the Pledged Property secure the full and timely payment of the principal of and premium, if any, and interest on, all of the Bonds issued pursuant to this Resolution or any Supplemental Resolution. The Bonds shall be special obligations of the System payable solely from the Pledged Property without recourse against other assets of the System. The Commonwealth shall not be liable for the Bonds or any Ancillary Bond Facility. Neither any Bond nor any Ancillary Bond Facility shall constitute a debt of the Commonwealth within the meaning of any constitutional provision, or a pledge of the good faith and credit of the Commonwealth or of the taxing power of the Commonwealth, and the Commonwealth shall not be liable to make any payments thereon, nor shall any Bond or any Ancillary Bond Facility be payable out of any funds or assets other than the Pledged Property, and the Bonds and each Ancillary Bond Facility shall contain a statement to the foregoing effect.

SECTION 202. General Provisions for Issuance of Bonds.

1. The Bonds may, if and when authorized by the System pursuant to one or more Supplemental Resolutions, be issued in one or more Series, as Senior Bonds or Subordinated Bonds, and the designation thereof, in addition to the name "Pension Funding Bonds," shall include such further appropriate particular designations added to or incorporated in such title for the Bonds of any particular Series as the System may determine, including designations of

Classes. Each Bond shall bear upon its face the designation so determined for the Series to which it belongs. Except as may be limited by applicable law, Bonds of a Series may be issued in the form of Capital Appreciation Bonds, Convertible Capital Appreciation Bonds, Current Interest Bonds, Adjustable Rate Bonds, Option Bonds, Fixed Tender Bonds, or any combination of the foregoing, or any other type of Bond that may legally be issued by the System, which in each case may include Serial Bonds or Term Bonds, or any combination thereof.

2. Each Supplemental Resolution authorizing or providing for the issuance of a Series of Bonds shall also specify, except as may be limited by applicable law:

(i) the authorized principal amount and designation of such Series of Bonds;

(ii) the purpose or purposes for which such Series of Bonds are being issued, which shall be one or more of the following, to the extent then permitted by applicable law and the provisions of this Resolution: (a) to provide sufficient funds in order to fund the System and decrease the unfunded liability of the System; (b) to refund or otherwise prepay any Bonds or other evidences of indebtedness issued by the System; (c) to pay or provide for the payment of Financing Costs, including

* * *

occur on account of a failure to comply with a condition or event stated in the notice to the Fiscal Agent pursuant to Section 402 and in the notice of redemption pursuant to Section 405. If there shall be called for redemption less than all of a Bond, the System shall execute and the Fiscal Agent shall authenticate

and deliver, upon the surrender of such Bond, without charge to the Owner thereof, for the unredeemed balance of the principal amount of the Bond so surrendered, Bonds of like Series and maturity in any authorized denomination. If, on the redemption date, moneys for the redemption of all the Bonds (or portions thereof) of any like Series and maturity and interest rate to be redeemed, together with interest to the redemption date, shall be held by the Fiscal Agent so as to be available therefor on said date and if notice of redemption shall have been provided as aforesaid, and, with respect to any conditional notice of redemption, the conditions stated in the notice of redemption shall have been met and satisfied, then, from and after the redemption date, interest on the Bonds (or portions thereof) of such Series and maturity and interest rate so called for redemption shall cease to accrue and become payable. If said moneys shall not be so available on the redemption date, such Bonds (or portions thereof) shall continue to bear interest until paid at the same rate as they would have borne had they not been called for redemption.

SECTION 407. Cancellation and Disposition of Bonds. All Bonds paid or redeemed, either at or before maturity, shall be delivered to the Fiscal Agent when such payment or redemption is made, and such Bonds shall thereupon be promptly canceled. Bonds so canceled shall be disposed of by the Fiscal Agent, in accordance with the Fiscal Agent's standard procedures, and, upon request from the System, the Fiscal Agent shall execute a certificate of disposition in duplicate by the signature of one of its Authorized Officers describing the Bonds so disposed of, and one executed certificate shall be delivered to the System and the other executed certificate shall be retained by the Fiscal Agent.

ARTICLE V
PLEDGE, ASSIGNMENT AND SECURITY INTEREST; ESTABLISHMENT AND MAINTENANCE OF FUNDS AND ACCOUNTS AND APPLICATION THEREOF

SECTION 501. Pledge, Assignment and Security Interest.

1. The pledge and assignment of, and the grant of a security interest in and over, the Pledged Property, subject to Section 804, in favor of the Fiscal Agent for the benefit of the Bondholders and for the payment and as security for the payment of the Principal Installments and Redemption Price of and interest on the Bonds and payments due under Credit Facilities, and payments due under Liquidity Facilities and Qualified Hedges is hereby authorized, created and granted in accordance with the terms and provisions of this Resolution and subject to the provisions of this Resolution permitting the application of the Pledged Property for the purposes and on the terms and conditions set forth in this Resolution, and in each case subject to the provisions regarding priority of payment as between the Senior Bonds and the Subordinated Bonds. Nothing contained herein shall prevent a Credit Facility or Liquidity Facility from being provided with respect to any particular Bonds and not others. To further evidence such pledge, assignment and grant of security interest, the Fiscal Agent and the System shall execute the Security Agreement and the System shall cause the proper filing of the Security Agreement in accordance with the Uniform Commercial Code as in effect in Puerto Rico.

2. To the fullest extent provided by the Act and other applicable law, the pledge, assignment and grant of security interest provided by this Section

shall be valid and binding, and the Pledged Property shall immediately be subject to the lien of this pledge, assignment and security interest without any physical delivery thereof or further act, and the lien of this pledge, assignment and security interest shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the System, irrespective of whether such parties have notice thereof.

SECTION 502. Establishment of Fund and Accounts.

1. The "Project Fund" is hereby created and the following Accounts and Subaccounts are hereby created and established within the Project Fund, each of which shall have as a prefix "Employees Retirement System of the Government of the Commonwealth of Puerto Rico" and shall be held by the Fiscal Agent:

(1) Capitalized Interest Account,

(2) Revenue Account,

(3) Debt Service Account, which, if there shall be any Subordinated Bonds Outstanding, shall be established for each Class of Bonds, and each of which shall contain therein a Principal Subaccount and an Interest Subaccount,

(4) Debt Service Reserve Account, which, if there shall be any Subordinated Bonds Outstanding, shall be established for each Class of Bonds,

(5) General Reserve Account, and

(6) Redemption Account, which, if there shall be any Subordinated Bonds Outstanding, shall be established for each Class of Bonds.

2. The System may establish and create such other Accounts in the Fund, or such other Subaccounts in any Account, as may be authorized pursuant to any Supplemental Resolution, including a Supplemental Resolution authorizing a Series of Bonds, and deposit therein such amounts as may from time to time be held for the credit of any Account or Subaccount.

3. Amounts held by the System or by the Fiscal Agent at any time in the Fund or any Accounts and Subaccounts established pursuant to this Section, as the case may be, shall be held in trust in separate Accounts and Subaccounts and shall be applied only in accordance with the provisions of this Resolution and the Act.

SECTION 503. Capitalized Interest Account.

1. There shall be deposited in the Capitalized Interest Account amounts, if any, determined as set forth in a Supplemental Resolution and as required by paragraph (xiii) of subsection 2 of Section 202 and authorizing the issuance of a Series of Bonds.

2. Moneys in the Capitalized Interest Account or any Subaccount thereof shall be transferred to the corresponding Interest Subaccount in the Debt Service Account on or prior to the Business Day preceding each Interest Payment

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Person who has executed a Credit Facility with the System, or otherwise has provided a Credit Facility at the request of the System, for the benefit of any of the Bonds.

Currency shall mean Dollars or Foreign Currency or Currency Unit.

Currency Unit shall mean a composite currency or currency unit the value of which is determined by reference to the value of the currencies of any group of countries.

Current Interest Bonds shall mean Bonds that bear interest which is not compounded but is payable on a current basis on established dates prior to maturity.

Current Interest Commencement Date shall mean the date established prior to the issuance of each Series of Convertible Capital Appreciation Bonds, at which time the periodic compounding of interest ceases and on and after which date interest is payable currently on the Accreted Amounts on the next ensuing interest payment dates.

Debt Service Account shall mean the Account by that name established by Section 502.

Debt Service Reserve Account shall mean the Account by that name established by Section 502.

Debt Service Reserve Requirement shall mean, as of any date of calculation, fifty percent (50%) of the average of the Accrued Payment Obligation as of the first Business Day of each Bond Year for each of the following five (5) Bond Years.

Defeasance Obligations shall mean any of the following which are not callable or redeemable at the option of the issuer thereof, if and to the extent the same are at the time legal for the investment of the System's funds:

(i) Government Obligations;

(ii) Defeased Municipal Obligations;

(iii) certificates, depositary receipts or other instruments which evidence a direct ownership interest in obligations described in clauses (i) or (ii) above or in any specific interest or principal payments due in respect thereof; *provided*, *however*, that the custodian of such obligations or specific interest or principal payments shall be a bank or trust company organized under the laws of the United States of America, of the Commonwealth, or of any state or territory of the United States of America or of the District of Columbia, with a combined capital stock, surplus and undivided profits of at least $50,000,000 or the custodian is appointed by or on behalf of the United States of America; and *provided further*, *however*, that except as may be otherwise required by law, such custodian shall be obligated to pay to the holders of such certificates, depositary receipts or other instruments the full amount received by such custodian in respect of such obligations or specific payments and shall not be permitted to make any deduction therefrom; or

(iv) a share or interest in a mutual fund, partnership or other fund wholly comprised of obligations described in clauses (i) through (v) above.

Defeased Municipal Obligations shall mean any bonds or other obligations of any state or territory of the United States of America, of the Commonwealth, or of any agency, instrumentality or local governmental unit of any such state or territory or Commonwealth which are not callable at the option of the obligor prior to maturity or as to which irrevocable instructions have been given by the obligor to call on the date specified in the notice; and

(i) which are rated, based on an irrevocable escrow account or fund (the "escrow"), in the highest Rating category of any Rating Agency; or

(ii) (a) which are fully secured as to principal, interest and redemption premium, if any, by an escrow consisting only of cash or Government Obligations, which escrow may be applied only to the payment of such principal and interest and redemption premium, if any, on such bonds or other obligations on the maturity date or dates thereof or the specified redemption date or dates pursuant to such irrevocable instructions, as appropriate, and (b) which escrow is sufficient, without reinvestment, as verified by a nationally recognized independent certified public accountant, or other nationally recognized verification agent acceptable to the Fiscal Agent, to pay principal of and interest and redemption premium, if any, on the bonds or other obligations described in this paragraph on the maturity date or dates specified in the irrevocable instructions referred to above, as appropriate.

Dollar or **$** shall mean a dollar or other equivalent unit in such coin or currency of the United States as at the time of payment is legal tender for the payment of public and private debts.

Employers shall mean, pursuant to the Act, the government of Puerto Rico, or any Public Enterprise, or municipality, but shall exclude, however, those subsidiary enterprises of government instrumentalities whose employees, in the judgment of the Board of Trustees of the System, may not have a clear relationship of employee and employer with regard to the Commonwealth.

Employers' Contributions shall mean the contributions paid from and after the date hereof that are made by the Employers and any assets in lieu thereof or derived thereunder which are payable to the System pursuant to Sections 2-116, 3-105 and 4-113 of the Act.

Employers' Contribution Rate shall mean the rate of contribution of each Employer to the System, initially 9.275% of the Covered Payroll.

Event of Default shall mean an event described in paragraph I of Section 1101.

Financing Costs shall mean, with respect to any Bonds, all costs of issuance and any other fees, discounts, expenses and costs related to issuing, securing and marketing the Bonds.

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direction, notice, consent or waiver only Bonds which an Authorized Officer of the Fiscal Agent knows to be so owned shall be so disregarded. Bonds so owned which have been pledged in good faith may be regarded as Outstanding if the pledgee establishes to the satisfaction of the Fiscal Agent the pledgee's right so to act with respect to such Bonds and that the pledgee is not the System, and (ii) the principal amount of a Convertible Capital Appreciation Bond or a Capital Appreciation Bond that shall be deemed Outstanding for such purposes shall be the Accreted Amount thereof except as otherwise provided in this Resolution.

Owner or **Owner of Bonds** shall mean each Bondowner.

Parity Hedge Obligations shall mean, as allocated to a Series of Bonds pursuant to the terms

of the related Supplemental Resolution, fixed and scheduled payments by the System under Qualified Hedges. Parity Hedge Obligations shall not include, among other things, any costs, indemnities, termination payments or similar non-recurring amounts, or any amortization of such non-recurring amounts.

Parity Obligations shall mean, collectively, all Parity Reimbursement Obligations and Parity Hedge Obligations.

Parity Reimbursement Obligations shall mean, as allocated to a Series of Bonds pursuant to the terms of the related Supplemental Resolution, fixed and scheduled payments due from the System to any Credit Facility Provider or Liquidity Facility Provider, as provided by Section 206, whether such reimbursements or payments are made to the Credit Facility Provider or Liquidity Facility Provider as a Bondowner, as a subrogee or otherwise. Parity Reimbursement Obligations shall include, among other things, reimbursements of direct-pay letters of credit to be drawn on each principal and/or interest payment date.

Person or **Persons** shall mean an individual, partnership, limited liability partnership, corporation, limited liability corporation, trust or unincorporated organization and a government or agency or political subdivision or branch thereof.

Pledged Property shall mean the following, collectively (but without duplication), except as otherwise may be provided with respect to a Series of Bonds by the Supplemental Resolution authorizing such Bonds:

1. All Revenues.

2. All right, title and interest of the System in and to Revenues, and all rights to receive the same.

3. The Funds, Accounts, and Subaccounts held by the Fiscal Agent, and moneys and securities and, in the case of the Debt Service Reserve Account, Reserve Account Cash Equivalents from time to time held by the Fiscal Agent under the terms of this Resolution, subject to the application thereof as provided in this Resolution and to the provisions of Sections 1301 and 1303.

4. Any and all other rights and personal property of every kind and nature from time to time hereafter pledged and assigned by the System to the Fiscal Agent as and for additional security for the Bonds and Parity Obligations.

5. Any and all cash and non-cash proceeds, products, offspring, rents and profits from any of the Pledged Property mentioned described in paragraphs (1) through (4) above, including, without limitation, those from the sale, exchange, transfer, collection, loss, damage, disposition, substitution or replacement of any of the foregoing.

Principal Installment shall mean, as of any date with respect to any Series, so long as any Bonds thereof are Outstanding, the sum of (i) the principal amount and Accreted Amount (to the extent applicable) of Bonds of such Series (including the principal amount of Option Bonds tendered for payment and not purchased) due (or so tendered for payment and not purchased) on such date for which no Sinking Fund Installments have been established, and (ii) the

unsatisfied balance (determined as provided in Section 507) of any Sinking Fund Installments due on such date for Bonds of such Series, together with the premiums, if any, payable upon the redemption of such Bonds by application of such Sinking Fund Installments.

Principal Subaccount shall mean the Principal Subaccount established in the Debt Service Account by Section 502.

Public Enterprise shall mean any government instrumentality or public corporation of the Commonwealth.

Qualified Hedge shall mean, with respect to particular Bonds, (i) any financial arrangement (a) which is entered into by the System with an entity that is a Qualified Hedge Provider at the time the arrangement is entered into, (b) which is a cap, floor or collar, forward rate, future rate, swap (such swap may be based on an amount equal either to the principal amount of such Bonds as may be designated or a notional principal amount relating to all or a portion of the principal amount of such Bonds), asset, index, Currency, price or market-linked transaction or agreement, other exchange or rate protection transaction agreement, other similar transaction (however designated), or any combination thereof, or any option with respect to any of the foregoing, executed by the System, and (c) which has been designated as a Qualified Hedge with respect to such Bonds in a written determination signed by an Authorized Officer and delivered to the Fiscal Agent, and (ii) any Credit Facility securing the obligations of the System under any financial arrangement described in clause (i) above. Each Qualified Hedge shall provide that the System and the Qualified Hedge Provider shall provide not

less than ten-days' prior written notice of any amendment to the Fiscal Agent.

Qualified Hedge Provider shall mean a Person whose long-term obligations, other unsecured, long-term obligations, financial program rating, counterparty rating, or claims paying ability, or whose payment obligations under an agreement that would be a Qualified Hedge are guaranteed by an entity whose long term debt obligations, other unsecured long term obligations, financial program rating, counterparty rating, or claims paying ability, are rated, or whose payment obligations under an interest rate exchange agreement are collateralized in such manner as to cause such agreement to be rated, at the time of the execution of such Qualified Hedge, either (i) at least as high as the third highest Rating Category of each Rating Agency, but in no event lower than any Rating Category designated by any such Rating Agency for the Bonds subject to such Qualified Hedge (without reference to bond insurance, if any), or (ii) any such lower Rating Categories which each such Rating Agency indicates in writing to the System and the Fiscal Agent will not, by itself, result in a reduction or withdrawal of its Rating (without reference to bond insurance, if any) on the Outstanding Bonds, and (iii) a Person whose payment obligations under an interest rate exchange agreement are subject to collateralization requirements that, as evidenced in writing to the System and the Fiscal Agent by each Rating Agency, will not, by itself, result in a reduction or withdrawal of its Rating (without reference to bond insurance, if any) on the Outstanding Bonds.

Rating shall mean a rating published by a Rating Agency with respect to any or all Bonds. Any

provision of this Resolution that specifies that an action may not be taken if it shall result in a reduction, suspension or withdrawal of the Rating of the Bonds, with respect to any Bonds that are the subject of a Credit Facility, shall mean the Rating of such Bonds without taking into account the credit enhancement provided by such Credit Facility.

Rating Agency shall mean each nationally recognized statistical rating organization then maintaining a rating on the Bonds at the request of the System.

Rating Category shall mean one of the generic rating categories of any Rating Agency without regard to any refinement or gradation of such rating within any such category by a numerical modifier or otherwise.

Record Date shall mean, with respect to each payment of interest on a Bond, each date specified as the "record date" therefor in the Supplemental Resolution authorizing such Bond, or if no such date is specified, the 15th day of the month preceding the date of such payment.

Redemption Account shall mean the Account by that name established by Section 502.

Redemption Price shall mean, when used with respect to a Bond (other than a Convertible Capital Appreciation Bond or a Capital Appreciation Bond) or a portion thereof to be redeemed, the principal amount of such Bond or such portion thereof plus the applicable premium, if any, and, when used with respect to a Convertible Capital Appreciation Bond or a Capital Appreciation Bond, shall mean the Accreted Amount on the date of redemption of such Bond (or portion thereof) plus the applicable premium, if any,

payable in either case upon redemption thereof, pursuant to this Resolution and the applicable Supplemental Resolution.

Refunding Bonds shall mean all Bonds authenticated and delivered on original issuance pursuant to Section 204 or thereafter authenticated and delivered in lieu of or in substitution for any such Bond pursuant to this Resolution and the applicable Supplemental Resolution.

Reserve Account Cash Equivalent shall mean a letter of credit, insurance policy, surety, guaranty or other security arrangement provided to the Fiscal Agent as a substitute for the deposit of cash and/or Investment Securities, or another Reserve Account Cash Equivalent, in the Debt Service Reserve Account pursuant to Section 506. Each such arrangement shall be provided by a Person whose claims paying ability has been assigned a rating from each Rating Agency at least equal to the then existing rating on the Bonds or whose unsecured, long-term debt securities are rated by each Rating Agency at least equal to the then existing Rating on the Bonds (or the highest short-term rating if the Reserve Account Cash Equivalent has a remaining term measured from the date it is provided not exceeding one year).

Resolution shall mean this Bond Resolution, as from time to time amended or supplemented by Supplemental Resolutions.

Revenue Account shall mean the Account by that name established by Section 502.

Revenues shall mean the following, collectively (but without duplication), except as otherwise may be provided with respect to a Series of Bonds

by the Supplemental Resolution authorizing such Bonds:

1. All Employers' Contributions received by the System or the Fiscal Agent.

2. With respect to any particular Bonds, the proceeds of any draw on or payment under any Credit Facility which is intended for the payment of such Bonds, but only for purposes of such payment and not for other purposes of this Resolution.

3. Net amounts received by the System pursuant to a Qualified Hedge.

4. Income and interest earned and gains realized in excess of losses suffered by any Fund, Account, or Subaccount held by the Fiscal Agent under the terms of this Resolution, subject to the provisions of Sections 1301 and 1303.

5. Any other revenues, fees, charges, surcharges, rents, proceeds or other income and receipts received by or on behalf of the System or by the Fiscal Agent, lawfully available for the purposes of this Resolution and deposited by or on behalf of the System or by the Fiscal Agent in any Fund, Account, or Subaccount held by the Fiscal Agent under the terms of this Resolution, subject to the provisions of Sections 1301 and 1303.

Security Agreement means the Security Agreement dated as of January 31, 2008 between the System and the Fiscal Agent, in the form appended hereto as Appendix A.

Senior Bonds shall mean the Series A Bonds and any Bonds of a Class the priority of payment of which under this Resolution is equal with that of the Series A Bonds.

Serial Bonds shall mean Bonds which have no Sinking Fund Installment.

Series shall mean all of the Bonds authenticated and delivered on original issuance identified pursuant to a Supplemental Resolution as a separate series of Bonds, and any Bonds thereafter authenticated and delivered in lieu of or in substitution therefor pursuant to Article III or Section 1007, regardless of variations in maturities, principal amounts, interest rates or other provisions.

Series A Bonds shall mean the System's Senior Pension Funding Bonds, Series A, the initial Series of Bonds to be issued under this Resolution.